No. 2358

United States
Circuit Court of Appeals
For the Ninth Circuit.

L. V. WELLS,

Appellant,

vs.

J. B. LINCOLN, as Trustee in Bankruptcy of the Estate of WENATCHEE HEIGHTS ORCHARD COMPANY, a Corporation, Bankrupt,

Appellee,

and

J. B. LINCOLN, as Trustee in Bankruptcy of the Estate of the WENATCHEE HEIGHTS ORCHARD COMPANY, a Corporation, Bankrupt,

Appellant,

vs.

L. V. WELLS,

Appellee.

In the Matter of WENATCHEE HEIGHTS ORCHARD COMPANY, a Corporation, Bankrupt.

Transcript of Record.

Appeals from the United States District Court for the Western District of Washington, Northern Division.

FILMER BROS. CO. PRINT. 330 JACKSON ST., S. F., CAL.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Counsel.

CORWIN S. SHANK, Esquire, Attorney for L. V. Wells, Claimant,

1002 Alaska Building, Seattle, Washington.

H. C. BELT, Esquire, Attorney for L. V. Wells, Claimant,

1002 Alaska Building, Seattle, Washington.

RAYMOND D. OGDEN, Esquire, Attorney for J. B. Lincoln, Trustee,

506 Lowman Building, Seattle, Washington.

WALTER SCHAFFNER, Esquire, Attorney for J. B. Lincoln, Trustee,

506 Lowman Building, Seattle, Washington.

[3*]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN BANKRUPTCY—No. 5025.

In the Matter of WENATCHEE HEIGHTS ORCHARD COMPANY, a Corporation,

Bankrupt.

Petition for Adjudication.

To the Honorable Judges of the Above-entitled Court:

The petition of the undersigned, all of whom are creditors and parties in interest herein, respectfully shows:

1. That Wenatchee Heights Orchard Company, a

*Page-number appearing at foot of page of original certified Record.

corporation, has for the greater portion of the six months next preceding the date of the filing of this petition had its principal place of business in the city of Seattle, State and district aforesaid, and owes debts to the amount of One Thousand Dollars and upwards and is insolvent.

2. That the said Wenatchee Heights Orchard Company is a corporation organized and existing under the laws of the State of Washington, with its principal office and place of business at Seattle, in said District, and that it is a business and commercial corporation and is not a municipal railroad, insurance or banking corporation.

3. That your petitioners are creditors of the said Wenatchee Heights Orchard Company, having claims against it amounting in the aggregate in excess of securities held by them to the sum of Five Hundred Dollars.

4. That none of your petitioners is entitled to priority of payment of his said claim within the meaning of Section 64 (b) of the United States Bankruptcy Act and amendments thereof; nor has any of your petitioners received a [4] preference within the meaning of Section 60 (a)-(b) of said law as amended.

5. That the nature and amount of your petitioners' claims are as follows:

(a) That heretofore these petitioners for value purchased from the said Wenatchee Heights Orchard Company certain real property, said property being situated in Chelan County, Washington, and being a portion of what is known and designated as We-

natchee Heights Orchard Tracts, together with a perpetual water right to irrigate said land to the extent of two acre feet of water per acre per year during the irrigation season of each year, to wit, from the first day of April to the first day of November of each year, as stated in certain written contracts executed and delivered by the said Wenatchee Heights Orchard Company, a corporation, to said purchasers, and that numerous and divers other persons hold water right deeds and contracts of like tenor and effect from the said Wenatchee Heights Orchard Company, a corporation, all of said deeds and contracts being substantially as shown by Exhibit "A" hereunto annexed and hereby referred to and made a part hereof.

(b) That the lands of all of the petitioners herein are dry and arid and require artificial irrigation to make such lands, or any portion thereof, valuable for agricultural or horticultural purposes, and that such lands without such artificial irrigation are without commercial value whatever, and that two acre-feet of water per acre per annum during said irrigation period of each year are necessary for the irrigation of said lands. [5]

(c) That the lands of all of the petitioners and divers and numerous persons holding water right deeds and contracts from the said Wenatchee Heights Orchard Company, a corporation, are planted to orchards which are either in bearing or are coming into bearing and require the full amount of two acre-feet of water per acre per annum for

the irrigation thereof during the irrigation season of each year.

(d) That the irrigation system of said Wenatchee Heights Orchard Company, a corporation, consists of seventy-eight shares (or perhaps more) of stock in the Spring Hill Irrigation Company, a corporation organized and existing under and by virtue of the laws of the State of Washington, the said Spring Hill Irrigation Company operating and maintaining an irrigation system on what is known as Wheeler Hill, located in Chelan County, Washington, in close proximity to the lands of the petitioners herein.

(e) That the interest of the said Wenatchee Heights Orchard Company, a corporation, in and to the waters of said Spring Hill Irrigation Company, as said irrigation is now maintained, is not sufficient to supply petitioners herein, and other persons holding said water right deeds and contracts from the said Wenatchee Heights Orchard Company, a corporation, with water equivalent to two acre-feet of water per acre per annum for the land of the petitioners and other persons, or any substantial part thereof, or in any amount exceeding one-third of the amount provided for in said water right deed and contracts, during said irrigation season.

(f) That at all times since the execution and delivery of said water right deeds and contracts the said Wenatchee Heights Orchard Company, a corporation, has failed and refused to supply to the persons entitled thereto water as provided [6] in

and by said water right deeds and contracts (including these petitioners) the amount of water named in said deeds and contracts, or water in any amount exceeding one-third of the amount named in said deeds and contracts.

(g) That in addition to the failure and refusal of the said Wenatchee Heights Orchard Company, a corporation, to supply the said lands of these petitioners and said sundry other persons with the water provided for in and by said water right deeds and contracts and required by said lands, the said Wenatchee Heights Orchard Company, a corporation, has failed and refused, and does now fail and refuse to give said lands and the trees planted therein and the other improvements upon said lands, the cultivation, pruning, spraying and care provided for in said contracts, and in some instances has failed and refused to exercise the proper care in the planting of trees in said lands.

(h) That the said Wenatchee Heights Orchard Company, a corporation, has not paid the taxes and assessments upon the said lands to the extent required by said contracts, and that the unpaid and delinquent taxes which said corporation should pay and has not paid amount at this time to at least $1,200.00, as will more fully appear from the records in the office of the County Treasurer of said Chelan County.

(i) That in the case the claims of the petitioning creditors are founded upon express contracts in writing, as hereinbefore alleged, and that the claims of the petitioners, though unliquidated, are each

founded upon said express contracts and are provable claims under the provisions of the United States Bankruptcy Act and amendments thereof; that the lands of petitioners and the least amount of damages [7] to which petitioners contend they are entitled by reason of the aforesaid neglect, failure and refusal of said Wenatchee Heights Orchard Company, a corporation, to perform its contracts as hereinbefore set forth are particularly set forth in Exhibit "B" hereunto annexed and hereby referred to and made a part hereof.

(j) That in addition to the claims mentioned in said Exhibit "B," Jeane Sage Hotchkin, one of said claimants, has a demand for the default of said Wenatchee Heights Orchard Company, a corporation, to irrigate her said lands for the year 1909, which demand has heretofore been sued on by the said Jeane Sage Hotchkin in the Superior Court of the State of Washington for said Chelan County, and in said suit liquidated in the sum of $1,750.00, or thereabouts, and judgment accordingly entered in said Superior Court.

(k) That each and all of the claims of these petitioners (except the $1,750.00 claim of the said Jeane Sage Hotchkin) are in legal effect the same as the said $1,750.00 judgment claim of the said Jeane Sage Hotchkin, and that these petitioners do here and now apply to the Court that their said claims (with the exception of the said $1,750.00 judgment demand in favor of the said Jeane Sage Hotchkin) be liquidated in such manner as this Court shall direct, the petitioners here and now suggesting to the Court

that said unliquidated claims be liquidated at the trial of this cause, if trial be had; and that after said liquidation said claims may be proved and allowed against the estate of said bankrupt; that said claims are each provable demands against the estate of the said bankrupt. [8]

6. And your petitioners further represent that the said Wenatchee Heights Orchard Company, a corporation, while insolvent and within four months next preceding the date of this petition, committed an act of bankruptcy in that heretofore and on, to wit, the 17th day of January, 1913, because of insolvency, a receiver was put in charge of its property under the laws of the State of Washington by the Superior Court of the State of Washington for King County, in that certain cause then and theretofore and now pending in said court, entitled "William P. McElwain and F. E. Ryer as Plaintiffs, Against the said Wenatchee Heights Orchard Company, a Corporation, and Others, as Defendants," said cause bearing No. 91,741 upon the records of said court.

Wherefore, your petitioners pray that service of this petition, with a subpoena, may be made upon the said Wenatchee Heights Orchard Company, a corporation, as provided in the Acts of Congress relating to bankruptcy, and that said corporation may be adjudged a bankrupt within the purview of said acts, and that the unliquidated provable claims of the petitioners herein against the said bankrupt

be liquidated in such manner and at such time as this Court may direct.

J. B. LINCOLN,
Petitioner.
H. P. JOHNSTON,
Petitioner.
W. W. WHITE,
Petitioner.

RAYMUND D. OGDEN,
Attorney for Petitioners. **[9]**

United States of America,
Western District of Washington,
Northern Division,—ss.

J. B. Lincoln, H. P. Johnston and W. W. White, being three of the petitioners above named, do hereby make solemn oath that the statements contained in the foregoing petition, subscribed by them, are correct.

[Seal] WM. J. TAYLOR,
Notary Public in and for the State of Washington,
Residing at Seattle. **[10]**

Exhibit "A"—Fruit Land Contract.

It is hereby agreed by and between the Wenatchee Heights Orchard Company, a corporation, hereinafter called the grantor, and ..... hereinafter called the grantee, that the said grantor will sell to the said grantee and that said grantee will purchase of the said grantor the following described tract of land situated in Chelan County, State of Washington, and particularly described as follows, to wit: Tract Number ....., Block Number ..... of

Wenatchee Heights Orchard Tracts, Chelan County, Washington, according to the recorded plat thereof, together with a perpetual right appurtenant to said land to the use of water as hereinafter provided, together with the appurtenances, on the following terms:

First, the purchase price is ..... dollars, of which the sum of ..... dollars has this day been paid as earnest, the receipt whereof is hereby acknowledged by grantor, and the further sum of ..... dollars each and every month thereafter until the full purchase price has been paid at the office of the Treasurer of the grantor, or at a depositary designated by him, on or before the first business day of each calendar month until fully paid.

Second. The grantor shall plow and prepare said land for orchard use and shall plant it to orchard of standard varieties of fruit. Thereafter until full payment of said purchase price and until the election of the grantee to take possession as hereinafter provided, the grantor shall remain in possession of said premises and shall cultivate, irrigate, prune, spray and care for the same, and shall receive the crops from said land in lieu of interest on unpaid balance of purchase price, taxes and all assessments which may be levied or may accrue against said lands or for any part thereof, from this day until possession is delivered to the grantee as hereinafter provided, and as compensation for caring for said premises as aforesaid.

Third. The grantee may at any time elect to take

possession of said premises and upon such taking of possession the grantee shall pay interest on deferred payments at the rate of seven per cent per annum, and the grantor shall be relieved from all duty of further cultivating or caring for said premises or the said orchard, and from paying taxes or assessments thereon; Provided, that if said grantee shall not in any year have taken possession of said premises prior to the first day of March, in such year, he shall not have the right to take possession until after the first day of December of such year; Provided further, That the grantee shall in every case take possession within ..... years after full payment as aforesaid.

Fourth. The grantor agrees to furnish water for irrigation purposes for the said premises to the amount of two (2) acre feet of water per acre for ..... acres thereof during the irrigation season beginning April first and ending November first of each year, said water to be taken from the ditches, pipes or flumes of the grantor either at the boundary line of said premises or on said premises if any ditch, pipe or flume of the grantor crosses the same, subject to the reasonable regulation as to the place of taking and time and manner of such use by and under the supervision of the water superintendent of the grantor and subject to a yearly maintenance fee to be paid by the grantee to the grantor in such amount as shall be fixed by the grantor, but not exceeding Two dollars ($2.00) per acre. [11]

Fifth. Said land and water to be conveyed by a good and sufficient deed to said grantee when said purchase price shall have been fully made. Said

conveyance shall contain the same terms, provisions and reservations as to the said premises, water rights, maintenance fee, right of way, liability, etc., as are set forth in this contract.

Sixth. The grantor shall not be held liable hereunder for any default or damage caused by the act of God, inevitable accident or any extraordinary or unusual action of the elements.

Seventh. The grantor reserves the perpetual right of way to construct, maintain and operate on and across said premises ditches, flumes and pipe lines at such points as shall be determined to be necessary by the water superintendent of said grantor.

Eighth. Time is of the essence of this contract, and in case of a failure of the said grantee to make any payment or perform any covenant herein made, this contract shall be forfeited and determined at the option of the said grantor, the failure of the said grantor to exercise said option for any default not to be construed a waiver of this provision as to any subsequent default. In case of said forfeiture the grantees shall execute to the grantor a quitclaim deed to all his rights and title to the said premises in consideration for which the grantor shall give its bond to the grantee for the full amount paid on this contract, at the date of forfeiture, less ..... dollars said bond to bear five per cent per annum simple interest, principal and interest payable ten years after the date of issue of said bonds.

Ninth. Where the words grantor or grantee appear, it shall be held to include heirs, assigns, suc-

cessors or other legal representatives.

Witness our hands and seals in duplicate, this .... day of ..... A. D. 19....

Signed, sealed and delivered in presence of:

..... [Seal]

..... [Seal]

[12]

Exhibit "B" [List of Claims].

Claimant	Approximate Acreage.	Claim.
E. S. Hager	5	$ 500.00
R. M. Ragsdale	11	1,100.00
A. T. Sutton	15	1,500.00
John B. Sutherland	10	2,000.00
George W. Steinacker	13	1,300.00
J. S. Goelcher	2	400.00
P. F. Vian	10	2,000.00
J. P. Fitzgerald	5	1,000.00
W. W. White	7	1,400.00
F. B. Cosper	10	1,000.00
W. F. Kuhlman	14	2,800.00
J. B. Lincoln	9	1,800.00
R. H. Hotchkin	11	2,200.00
Jean Sage Hotchkin	16	3,200.00
D. M. Archibald	8	1,600.00
J. E. McDowell	5	1,000.00
E. A. Born	15	3,000.00
Helmer Johnson	5	1,000.00
J. L. Bean	7	1,400.00
H. T. Harding	17	3,400.00
Edna H. Wosker	5	1,000.00

[Indorsed]: Petition for Adjudication. Filed in the United States District Court, Western District of Washington. Jan. 18, 1913. Frank L. Crosby, Clerk. By B. O. Wright, Deputy. [13]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 5025.

In the Matter of WENATCHEE HEIGHTS ORCHARD COMPANY,

Bankrupt.

Order of Adjudication.

At Seattle, in said District, on the 23d day of April, A. D. 1913, before the Honorable Edward E. Cushman, Judge of said Court in bankruptcy, the petition of H. P. Johnstone, J. B. Lincoln and W. W. White, praying that Wenatchee Heights Orchard Company be adjudged a bankrupt within the true intent and meaning of the Acts of Congress relating to bankruptcy, and the answers thereto of said Wenatchee Heights Orchard Company and H. F. Butman, Receiver, together with the report of John P. Hoyt, the Special Master to whom said petition and answers and the issues raised thereby were referred, and the exceptions to said report, having been heard and duly considered,—

IT IS ORDERED, That the said exceptions be and they are, and each of them is, hereby overruled and denied, and that the said Wenatchee Heights

Orchard Company is hereby declared and adjudged bankrupt accordingly.

WITNESS the hand of Honorable EDWARD E. CUSHMAN, Judge of said Court, and the seal thereof, at Seattle, in said District, on the 23d day of April, A. D. 1913.

[Seal] FRANK L. CROSBY,
Clerk.
B. O. Wright,
Deputy.

Enter: EDWARD E. CUSHMAN,
Judge.

[Endorsed]: Order of Adjudication. Filed in the United States District Court, Western District of Washington. Apr. 23, 1913. Frank L. Crosby, Clerk. By B. O. Wright, Deputy. [14]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 5025.

In the Matter of WENATCHEE HEIGHTS ORCHARD COMPANY,
Bankrupt.

Order of Reference.

WHEREAS, The Wenatchee Heights Orchard Company of Seattle, in the County of King and District aforesaid, on the 23d day of April, A. D. 1913, was duly adjudged a bankrupt upon a petition filed in this Court against it on the 18th day of January,

1913, according to the provisions of the Acts of Congress relating to bankruptcy;

It is thereupon ORDERED, That said matter be referred to John P. Hoyt, one of the referees in bankruptcy of this court, to take such further proceedings therein as are required by said acts.

WITNESS the Honorable EDWARD E. CUSHMAN, Judge of said Court, and the seal thereof, at Seattle, in said District, on the 23d day of April, 1913.

[Seal] FRANK L. CROSBY,
Clerk.
B. O. Wright,
Deputy.

Enter: EDWARD E. CUSHMAN,
Judge.

[Endorsed]: Order of Reference. Filed in the United States District Court, Western District of Washington. Apr. 23, 1913. Frank L. Crosby, Clerk. By B. O. Wright, Deputy. [15]

[Claim of L. V. Wells.]

[Note Dated September 21, 1911, for $57,000.]

$57,000. Wenatchee, Wash., Sept. 21, 1911.

Ninety days after date, without grace we promise to pay to the order of L. V. Wells Fifty-seven Thousand ..... Dollars in Gold Coin of the United States of America, of the present standard value, with interest thereon, in like Gold Coin, at the rate of 7 per cent, per annum from date hereof until paid, for value received. Interest to be paid at maturity and if not so paid, the whole sum of both principal

and interest to become immediately due and collectible, at the option of the holder of this Note. And in case suit or action is instituted to collect this Note, or any portion thereof we promise and agree to pay, in addition to the costs and disbursements provided by statute a reasonable sum ..... Dollars in like Gold Coin, for attorney's fees in said suit or action.

Due ..... 190...

At .....

No. .....

WENATCHEE HEIGHTS ORCHARD CO.

By L. V. WELLS,
President.

[Seal] By E. H. McPHERSON,
Secretary.

[Endorsed on back as follows]: Without recourse.
L. V. WELLS. [15a]

[Note, Dated September 21, 1911, for $20,708.31.]

$20,708.31 Wenatchee, Wash., Sept. 21, 1911.

Ninety Days after date, without grace we promise to pay to the order of L. V. Wells Twenty Thousand, Seven Hundred Eight and 31/100 ..... Dollars in Gold Coin of the United States of America, of the present standard value, with interest thereon, in like Gold Coin, at the rate of 7 per cent, per annum from date hereof until paid, for value received. Interest to be paid at maturity and if not so paid, the whole sum of both principal and interest to become immedi-

ately due and collectible, at the option of the holder of this Note. And in case suit or action is instituted to collect this Note, or any portion thereof we promise and agree to pay, in addition to the costs and disbursements provided by statute a reasonable sum ..... Dollars in like Gold Coin, for attorney's fees in said suit or action.

Due ..... 190..

At .....

No. .....

WENATCHEE HEIGHTS ORCHARD CO.

By L. V. WELLS,
President.

[Seal] By E. H. McPHERSON,
Secretary.

[Endorsed on back as follows]: Without recourse.
L. V. WELLS. **[15b]**

In the District Court of the United States for the Western District of Washington, Northern Division.

IN BANKRUPTCY—No. ——.

In the Matter of WENATCHEE HEIGHTS ORCHARD COMPANY,

Bankrupt.

PROOF OF UNSECURED DEBT.

At Wenatchee, in the State of Washington, on the 10th day of May, A. D. 1913, came L. V. Wells, of Wenatchee, in the County of Chelan, in said State of Washington, and made oath and says that Wenatchee

Heights Orchard Company, the corporation against whom a Petition for Adjudication of Bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said deponent in the sum of Seventy-three Thousand, Seventy-one and 26/100 Dollars, with interest on $77,708.31 at 7% per annum from Sept. 21, 1911; that the consideration of said debt is as follows: Two promissory notes dated Sept. 21, 1911, for $57,000 and $20,708.31, respectively, given upon an account stated, also cash advanced for which no note was taken, as follows: Aug. 12, 1912, $1000; Oct. 11, 1912, $700; Dec. 1, 1912, $250; interest on $3,000, due to Netherlands American Bank in April and October, 1912; $214.20, interest on note to Talens due in October, 1912, $120; interest on $2,250, balance to Netherlands American Bank, $78.75; that no part of said debt has been paid; that there are no setoffs or counterclaims to the same except that the property of said bankrupt known as the "Ryer Homestead" has been mortgaged for the benefit of claimant, and it is estimated that $7,000 would release said property from said mortgage and that said deponent has not, nor has any person by his order, or to his knowledge or belief, for his use, had or received any manner of security for said debt whatever. [16]

And said creditor requests that all notices to which he may be entitled shall be addressed to him in care of H. C. Belt, Alaska Building, Seattle, Washington.

L. V. WELLS,
Creditor.

Subscribed and sworn to before me this 10th day of May, A. D. 1913.

[Seal] JOHN E. PORTER,
Notary Public for State of Washington, Residing at Wenatchee. [17]

[Endorsed]: Claim of L. V. Wells. Filed June 4th, 1913, 1 P. M., John P. Hoyt, Referee. Filed in the United States District Court, Western District of Washington. Oct. 21, 1913. Frank L. Crosby, Clerk. [17½]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 5025.

In the Matter of WENATCHEE HEIGHTS ORCHARD COMPANY,

Bankrupt.

Objections of the Trustee to Allowance of Claim of L. V. Wells.

Comes now J. B. Lincoln, the duly elected, qualified and acting Trustee of the above-named bankrupt, and objects to the allowance of the claim of L. V. Wells heretofore filed herein for the sum of $73,071.26, and for grounds of such objections shows the following:

I.

That the notes attached to said proof of claim and upon which the same is based were executed without any consideration whatever.

II.

That the note for $57,000.00 dated 21st day of September, 1911, attached to said proof of claim and upon which the said claim is in part based, has been fully paid and satisfied.

III.

That nothing whatever is due to the said L. V. Wells from said Wenatchee Heights Orchard Company, but that, on the contrary, the said L. V. Wells is indebted to said Wenatchee Heights Orchard Company and was at the time of the filing of the petition herein in the sum of $75,000.00 for his subscription to the capital stock of said bankrupt. [18]

IV.

That the sum of $40,000 of said claim was based upon an alleged agreement whereby said L. V. Wells sold to the Wenatchee Heights Orchard Company certain real estate together with 63 shares of the capital stock of the Spring Hill Irrigation Company, and was to receive in payment therefor 750 shares of the capital stock of said Wenatchee Heights Orchard Company, and there was to be paid to said Wells the sum of $40,000 and to certain other parties mentioned in said agreement the sum of $22,240; that in truth and in fact the said land sold to said Wenatchee Heights Orchard Company by said L. V. Wells was not worth to exceed the sum of $50,000; that at the time such sale was made said L. V. Wells was the President and one of the Trustees of the Wenatchee Heights Orchard Company and the owner of all the capital stock, and one E. H. McPherson, who, according to said agreement was to receive

the sum of $5,850, was the only other Trustee or officer of said corporation when said agreement was made; said L. V. Wells and E. H. McPherson knew that said land was worth not to exceed the sum of $50,000, and said contract was entered into by them on behalf of the Wenatchee Heights Orchard Company and themselves fraudulently and with the design and purpose of causing it to appear that the said capital stock of the Wenatchee Heights Orchard Company was fully paid, whereas, in truth and in fact, nothing whatever was ever paid thereon.

V.

That the said L. V. Wells is the legal owner and holder of 375 shares of the capital stock of the Wenatchee Heights Orchard Company of the par value of $37,500, on which nothing has been paid, and that said Wells is now indebted [19] to the bankrupt in said sum of $37,500 for said stock.

VI.

That a large part of said claim is based upon a claim for commission at 15 per cent upon all the lands sold by said bankrupt by reason of a certain resolution passed by the Board of Trustees of said bankrupt on the 30th day of March, 1907, at a time when the sole officers, trustees and stockholders were said L. V. Wells and E. H. McPherson, by which said E. H. McPherson and L. V. Wells were jointly allowed a commission on all lands to be sold by the company of 15 per cent; that in truth and in fact no such resolution was ever adopted by said Board of Directors so far as appears from the minutes of said corporation, but this Trustee further alleges that if

any such resolution was adopted, the same was adopted fraudulently and that said commission of 15 per cent was grossly excessive, and that a fair commission, if any is to be allowed for the sale of the property of the Wenatchee Heights Orchard Company, is not to exceed 5 per cent.

VII.

That said L. V. Wells is indebted to the bankrupt herein in a large sum of money, the exact amount of which the Trustee is not now able to ascertain, from moneys illegally and improperly withdrawn by him for and on account of said commissions claimed by him.

Wherefore, the Trustee prays that the said claim may be wholly disallowed.

R. D. OGDEN and
WALTER SCHAFFNER,
Attorneys for Trustee. [20]

State of Washington,
County of King,—ss.

Walter Schaffner, being first duly sworn, deposes and says that he is one of the attorneys for J. B. Lincoln, as Trustee herein, that he has read the foregoing objections, knows the contents thereof and believes the same to be true.

WALTER SCHAFFNER.

Subscribed and sworn to before me this 16th day of June, 1913.

[Seal] ETHEL CURRIER,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Indorsed]: Objections to Claim of L. V. Wells. Filed June 17, 1913, 11 A. M. John P. Hoyt, Referee. Filed in the United States District Court, Western Dist. of Washington, Oct. 21, 1913. Frank L. Crosby, Clerk. By ————, Deputy. [21]

Order [of Referee Allowing Claim of L. V. Wells in the Sum of $50,389.16, etc.].

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 5025.

In the Matter of the WENATCHEE HEIGHTS ORCHARD COMPANY, a Corporation, Bankrupt.

This matter coming on to be heard upon the claim of L. V. Wells, together with the objections of the Trustee heretofore filed thereto, and the Court having heard the evidence offered both in support of said claim and in support of the objections thereto, and being now fully advised in the premises, finds that the account between the said Wells and the alleged bankrupt herein stands as follows:

	Cr.
Note dated March 9, 1907	$40,000.00
Int. at 7% 5 yrs. 10 mos. 9 days to Mar. 18, 1913	16,473.28
Loan, June 25, 1907	4,000.00
Int. at 7% 6 yrs. 6 mos. 24 days	1,558.66
Loan, April 10, 1908	3,000.00
Int., 4 yrs. 9 mos. 8 days at 7%	1,044.22

Loan, April 26, 1910	2,200.00
Int. at 7% 2 yrs. 8 mos. 23 days	110.98
Loan December, 1911	1,150.00
Interest at 7% 1 year 1 mo. 6 days	88.55
Loan August 12, 1912	1,000.00
Loan October 11, 1912	700.00
Loan December 1, 1912	250.00
Advanced for interest on mortgage	214.20
" " " " "	120.00
" " " " "	78.75
Total	$71,988.64

[22]

	Total	Cr. Forward	$71,988.64
Dr.			
Total payments,	$11,955.05		
Less expense,	1,495.90		
	$10,459.15		
½ Auto	750.00		
Payment Aug. 23, 1911	4,000.00		
Int. 1 yr. 4 mos. 25 days to January 18, 1913	390.33		
Colby Contract	700.00		16,299.48
			$56,389.16

The Court further finds that the transfer of certain property to the Wenatchee Heights Orchard Company by said L. V. Wells on the 9th day of March, 1907, was a valid contract and conveyance and for a fair consideration, and that the note of Forty Thousand Dollars ($40,000.00) given in partial payment

thereof by the bankrupt to said L. V. Wells was a valid note and is now a valid outstanding obligation of said bankrupt.

And the Court further finds that the contract attempted to be entered into between the said bankrupt and L. V. Wells and E. H. McPherson on the 30th day of March, 1907, whereby the said Wells and McPherson were to receive fifteen per cent (15%) upon all land sold by the company, is invalid and of no force and effect, that the said Wells is not entitled to claim anything thereunder.

IT IS THEREFORE ORDERED, That the objections numbered one, two, three, four and five of the said Trustee to the allowance of the claim of L. V. Wells be and the same are, and each of them is, hereby overruled; [23]

AND IT IS FURTHER ORDERED, That the objections numbered six and seven be, and they are hereby, sustained to the extent of holding the said contract of March 30, 1907, invalid and to the extent of charging said L. V. Wells with all moneys or property received by him during the existence of said corporation or deducting the same from the amount of the indebtedness of said company to him.

IT IS FURTHER ORDERED, That the said claim of L. V. Wells be, and the same is hereby allowed in the sum of Fifty-six Thousand Three Hundred Eighty-nine and 16/100 Dollars, ($56,389.16).

The foregoing order is made without prejudice to the right to offset against the claim of said Wells now allowed such amount as may hereafter be determined to be properly chargeable to said Wells on ac-

count of a certain contract belonging to the bankrupt and transferred to the First National Bank of Wenatchee as collateral, and also to charge against said claim as now allowed such amount as may hereafter be determined by reason of the mortgaging of certain property of the bankrupt for the benefit of the said Wells and more fully shown by the testimony in exhibits herein.

Dated at Seattle, Washington, this 15th day of October, A. D. 1913.

JOHN P. HOYT,
Referee.

O.K. as to form.
H. C. BELT.

[Indorsed]: Order Re Claim of L. V. Wells. Filed Oct. 15, 1913, 1 P. M. John P. Hoyt, Referee. Filed in the United States District Court, Western District of Washington. Oct. 21, 1913. Frank L. Crosby, Clerk. By ————, Deputy. [24]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 5025.

In the Matter of the WENATCHEE HEIGHTS ORCHARD COMPANY, a Corporation,
Bankrupt.

Petition [of Trustee for Certification of Proceedings, etc., to District Court].

To the Honorable John P. Hoyt, Referee:

Your petitioner, J. B. Lincoln, the duly appointed,

qualified and acting Trustee of the above-named bankrupt, respectfully represents that on the 15th day of October, 1913, an order was entered allowing the claim of L. V. Wells in the sum of Fifty-six Thousand Three Hundred Eighty-nine and 16/100 Dollars ($56,389.16), and your petitioner further represents that in said order and in the proceedings and record therein there is manifest error in this:

1. The Referee erred in overruling objection number one of the Trustee to said claim.

2. The Referee erred in overruling objection number two of the Trustee to said claim.

3. The Referee erred in overruling objection number three of the Trustee to said claim.

4. The Referee erred in overruling objection number four of the Trustee to said claim.

5. The Referee erred in overruling objection number five of the Trustee to said claim.

6. The Referee erred in allowing said claim in the sum of $56,389.16 or in any other sum whatsoever.

7. The Referee erred in holding that the conveyance of property by said Wells to Wenatchee Heights Orchard Company on [25] the 9th day of March, 1907, was for a valid and fair consideration.

8. The Referee erred in holding that the note of Forty Thousand Dollars ($40,000.00), given by the bankrupt to said L. V. Wells on the 9th day of March, 1907, was for a fair consideration.

9. The Referee erred in not holding that the conveyance of the property to the corporation by said Wells on or about the 9th day of March, 1907, was a fraudulently gross over-valuation.

10. The Referee erred in not holding that the said Wells was indebted to said corporation in the sum of Seventy-five Thousand Dollars ($75,000.00) for his subscription to the capital stock of said company.

11. The Referee erred in not holding that the note of Fifty-seven Thousand Dollars ($57,000.00) mentioned in the proof of claim of said L. V. Wells was fully paid and satisfied.

WHEREFORE, the Trustee prays that the order, record and proceedings aforesaid may be certified to the Judge of this court for his opinion.

J. B. LINCOLN,
Trustee.

State of Washington,
County of King,—ss.

Walter Schaffner, being first duly sworn, on oath says: That he has read the foregoing petition, knows the contents thereof, and believes the same to be true.

WALTER SCHAFFNER.

Subscribed and sworn to before me this 15th day of October, 1913.

[Seal] RAYMOND D. OGDEN,
Notary Public in and for the State of Washington,
Residing at Seattle. **[26]**

[Endorsed]: Petition for Review. Filed Oct. 16th, 1913, 11 A. M. John P. Hoyt, Referee. Filed in the United States District Court, Western District of Washington. Oct. 21, 1913. Frank L. Crosby, Clerk. **[27]**

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 5025.

In the Matter of WENATCHEE HEIGHTS ORCHARD COMPANY, a Corporation,

Bankrupt.

Petition of L. V. Wells for Review [by District Court].

To the Honorable John P. Hoyt, Referee in Bankruptcy.

Your petitioner, L. V. Wells, respectfully shows:

That your petitioner did on June 4, 1913, file a proof of claim in the above-entitled cause whereby he claimed an indebtedness from the said bankrupt to himself in the sum of $73,071.26, with interest on $77,708.31 at 7% per annum from September 21, 1911, up to the date of bankruptcy.

That on the 15th day of October, 1913, an order was entered allowing the same claim in the sum of $56,389.16, and disallowing the said claim as to the remainder.

That such order was and is erroneous in the following particulars:

1. The Referee erred in refusing to allow that portion of the said claim which was founded upon a note of the said bankrupt dated January 2, 1908, for $10,911.62 with interest at the rate of 7% per annum from said date; the note having been given as a balance for commissions earned by this petitioner up to

that date over the above charges and withdrawals under a contract made with the said bankrupt pursuant to a resolution dated March 30, 1907. [28]

2. The Referee erred in refusing to allow that portion of the said claim which was founded upon a note of the said bankrupt dated January 2, 1909, for $2,439.67, with interest at the rate of 7% per annum from said date; the said note having been given as a balance for commissions earned by this petitioner up to that date over and above charges and withdrawals under a contract made with the said bankrupt pursuant to a resolution dated March 30, 1907.

3. The Referee erred in charging against this petitioner the sum of $686.80, being moneys withdrawn from the said bankrupt by this petitioner during the years 1906 and 1907 on account of commissions earned.

4. The Referee erred in charging against this petitioner the sum of $3,622.35, being moneys withdrawn from the said bankrupt by this petitioner during the year 1908 on account of commissions earned.

5. The Referee erred in charging against this petitioner the sum of $1,800.00, being moneys withdrawn from the said bankrupt by this petitioner during the year 1910 on account of commissions earned.

6. The Referee erred in charging against this petitioner the sum of $1,800, being moneys withdrawn from said bankrupt by this petitioner from January 1, 1911, to October 1, 1911, on account of commissions.

7. The Referee erred in charging against this petitioner the sum of $1,800, being moneys withdrawn

from said bankrupt by this petitioner from October 1, 1911, to December 31, 1911, on account of commissions earned. [29]

8. The Referee erred in charging against this petitioner the sum of $1,500, being the amount paid during the year 1909, for an automobile for use in the company's business.

9. The Referee erred in holding that this petitioner is not entitled to claim anything on account of commissions for the sale of real estate sold for the bankrupt.

WHEREFORE your petitioner, feeling aggrieved because of such order, prays that the same may be reviewed as provided in the bankruptcy acts and the orders and rules and practice of this Court.

CORWIN S. SHANK,
H. C. BELT,
Attorneys for Petitioner.

State of Washington,
County of King,—ss.

H. C. Belt, being first duly sworn, upon oath deposes and says: I am an attorney for the above-named petitioner and make this verification for and on behalf of said petitioner, for the reason that said petitioner is without the Western District of Washington. I have read the foregoing petition, know the contents thereof and believe the same to be true.

H. C. BELT.

Subscribed and sworn to before me this 18th day of October, 1913.

[Seal] LUCAS C. KELLS,

Notary Public in and for the State of Washington, Residing at Seattle.

Copy hereof received this Oct. 20, 1913.

R. D. OGDEN,
WALTER SCHAFFNER,
Attorneys for Trustee. **[30]**

[Indorsed]: Petition of L. V. Wells for Review. Filed Oct. 20, 1913, 2 P. M. John P. Hoyt, Referee. Filed in the United States District Court, Western District of Washington, Oct. 21, 1913. Frank L. Crosby, Clerk. By ————, Deputy. **[31]**

[Decision of U. S. District Court.]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 5025.

In the Matter of WENATCHEE HEIGHTS ORCHARD COMPANY, a Corporation,
Bankrupt.

Filed December 3, 1913.

WALTER SCHAFFNER, for Trustee.

RAYMOND D. OGDEN, CORWIN S. SHANK, H. C. BELT, for Claimants, Wells and McPherson.

CUSHMAN, District Judge.

Hearings were had before the Referee upon objections to the claims of L. V. Wells and E. H. McPher-

son, and the petition of the Trustee for leave to use the funds belonging to the estate of the bankrupt, for the purpose of complying with an order of the Public Service Commission of the State of Washington, made against said corporation before it was adjudicated a bankrupt, which order required the corporation to increase the supply of water for irrigation of the lands sold by it.

The Referee allowed the claims in part; disallowed a part and denied the petition of the Trustee. Both the claimants and trustee pray a review of the Referee's decision. For the reasons given by the Referee in his opinion, his order is affirmed and approved, except as stated herein. **[32]**

The claimants, L. V. Wells and E. H. McPherson, organized the Wenatchee Heights Orchard Company in 1906. They have since continued to be the sole stockholders and controlling officers of that company. That corporation, for the stock issued, acquired some twelve hundred acres of land near Wenatchee, a large part of which was suitable for orchards and capable of irrigation, together with certain shares of stock in an irrigation company.

The lands were, when acquired by the company, subject to a fifty thousand dollar mortgage, which was assumed by the company. In addition to the stock, the company agreed to pay, as part of the purchase price of the land, claimant Wells $40,000 and claimant McPherson $5,850. It is the allowance by the Referee of the residue of these amounts and interest of which the trustee complains.

A brief statement of the transactions prior to bank-

ruptcy is necessary. The lands of the company were platted for sale into five and ten acre tracts. To irrigate them, it was necessary to obtain water of the company in which the Wenatchee Heights Orchard Company held stock.

By the end of 1911, all but a few acres of the irrigable lands had been sold. The contracts under which the lands were sold provided for a "perpetual right, appurtenant to the said land, of the use of water * * *.

> "4. The grantor agrees to furnish water for irrigation purposes for the said premises to the amount of two (2) acre-feet of water per acre * * * during the irrigation season * * * .
>
> "5. Said land and water right to be conveyed by a warranty deed to said grantee when said purchase price shall have been fully made * * * ."

The grantor was to plow the ground; plant the orchards; cultivate, irrigate and care for them and pay the taxes until [33] the purchase price was fully paid.

In 1911, the Wenatchee Heights Orchard Company began trading its contracts with the purchasers of these tracts for real estate in and near Seattle, Washington. All of the contracts were, in a short time, exchanged.

In 1911, the company moved its office from Seattle to Wenatchee. In the same year suit was brought against the company by one of its contract holders for damages on account of a failure to furnish the agreed amount of water for irrigation. A judgment

for Twelve Hundred Dollars was obtained in the course of the year and paid by the bankrupt.

In 1912, a similar suit was brought by another contract holder, who obtained a judgment for Two Thousand Dollars. This suit was appealed. In the same year, upon complaint of other contract holders, after a hearing, the Public Service Commission of the State of Washington found the water supply insufficient to furnish the water provided for in the deeds and contracts of the company and ordered the corporation to so increase the water supply as to furnish it. This was not done.

Some time prior to December 5, 1911, the Summit Investment Company was incorporated. The claimant L. V. Wells caused all of its stock, save one share, to be issued, or transferred, to one B. E. Gates, who had theretofore, as agent, assisted in selling some of the orchard tracts of the Wenatchee Heights Orchard Company—the one remaining share being issued to the wife of Gates.

While Gates had, theretofore, been engaged as stated, and there may have been a small balance due him upon some of his transactions with the Wenatchee Heights Orchard [34] Company, it is clear from the testimony that the stock in the Summit Investment Company was given to him without consideration. Gates became president and his wife secretary and treasurer of that company. The only property ever held by it was transferred to it by the Wenatchee Heights Orchard Company.

New ninety day notes were made out by the Wenatchee Heights Orchard Company to claimants

L. V. Wells and E. H. McPherson, dated September 21, 1911, which notes included the residue of the original indebtedness, which has been allowed by the Referee.

Under date of October 10, 1911, the minutes of a stockholders' meeting of the Wenatchee Heights Orchard Company, signed by the claimants, L. V. Wells and E. H. McPherson embody the following letter addressed to that company on the letter-head of B. E. Gates and signed by him:

> "Having purchased the following promissory notes made by your Company, viz., one dated Sept. 21, 1911, to L. V. Wells for $57,000, due ninety days from date, and one dated Sept. 21, 1911, to E. H. McPherson for $18,000, due ninety days from date, and being desirous of collecting the same, I propose to take the following described property in full satisfaction of the said notes and accumulated interest: * * *
>
> I agree to assume the mortgages against the above property, amounting to $33,500."

The minutes then continue:

> "After careful consideration of the proposal, on motion duly made by a stockholder, seconded and unanimously carried, all stock voting in favor, it was decided to accept the said proposal. * * *
>
> L. V. WELLS,
> E. H. McPHERSON."

The minutes of a special meeting of the Trustees of the Wenatchee Heights Orchard Company, held the same date, read:

"Whereas, the proposal of B. E. Gates to accept certain property of the company in payment of notes given by the company to L. V. Wells and E. H. McPherson and held by him, having been accepted by the stockholders, therefore, [35]

Resolved, that the President and Secretary be and are hereby authorized to complete the transfer in accordance with said proposal. * * *

E. H. McPHERSON,
Secretary.

L. V. WELLS,
President."

The minutes of a special meeting of the Board of Trustees, under date of December 7, 1911, read:

"Upon motion duly made by a trustee, and seconded, the following resolution was unanimously adopted:

'Whereas, the trustees and stockholders of the company have hertofore accepted a proposition made by B. E. Gates to exchange certain property for notes given by the company to L. V. Wells and E. H. McPherson, and

'Whereas, a request has been received from the said B. E. Gates, that the above property be deeded to the Summit Investment Company.

'Resolved, that the President and Secretary be and are hereby authorized to execute the necessary deeds as referred to in a resolution adopted by the trustees on Oct. 10, 1911, to the

Summit Investment Company, instead of to B. E. Gates.' * * *

"E. H. McPHERSON,
Secretary.

L. V. WELLS,
President."

In accordance with these resolutions, transfers were made to the Summit Investment Company.

Claimants Wells and McPherson both testified that they never parted with the notes mentioned in these minutes; that they were not purchased by, or assigned to Gates, and were never surrendered by claimants or cancelled at the time of the transfer of the real property to the Summit Investment Company, or at all. E. H. McPherson testifies:

"Q. Now, at the time of these transactions, who held these notes?

A. Well, to explain the whole situation; of course, we still held the notes. It was simply a means of transferring this property out of the hands of the Wenatchee Heights Orchard Company to the Summit Investment Company. [36]

Q. Was there any change in the physical possession of that property?

A. Not at all.

Q. Did you ever hand the notes over to Mr. Gates? A. No.

Q. Mr. Gates never had them at all?

A. Never had them.

Q. And they weren't cancelled and new notes issued? A. No, they were not cancelled.

Q. The whole transaction was merely a fiction

except so far as the property was transferred?

A. The property was transferred to get it out of the hands of the Wenatchee Heights Orchard Company.

Q. But the notes being transferred to Mr. Gates, that part was all a fiction?

A. He never really held them.

Q. Never had any interest in them?

A. No."

No acknowledgment of trust by either Gates or the Summit Investment Company, admitting the interest of either Wells, McPherson or the Wenatchee Heights Orchard Company was made; nor was any record preserved of any such interest.

The testimony on behalf of claimants is to the further effect that the property, after the transfer to the Summit Investment Company continued in the control of the Wenatchee Heights Orchard Company.

In December, 1912, suit was brought in the Superior Court of King County by certain contract holders of the Wenatchee Heights Orchard Company against it, the Summit Investment Company, Wells, McPherson, Gates and his wife for the appointment of a receiver for the Wenatchee Heights Orchard Company and to have the property transferred to the Summit Investment Company adjudged to belong to the Wenatchee Heights Orchard Company [37] subsequent to the appointment of a receiver for the Wenatchee Heights Orchard Company, it was adjudicated a bankrupt.

In the suit in the Superior Court, an agreement was eventually reached between the plaintiffs, the re-

ceiver and the defendants, Wells and McPherson, which recited that all the property of the Summit Investment Company, was, in effect, the property of the Wenatchee Heights Orchard Company. It provided for new directors for each of these companies. It further provided that the Summit Investment Company should supply the funds required to perform the obligations of the Wenatchee Heights Orchard Company, so far as the same could be supplied from that company's assets. Further provision was made for the transfer of all of the stock of the Summit Investment Company to a Trustee, except sufficient shares to qualify the directors to hold office.

> "And the said Wenatchee Heights Orchard Company shall in particular, as soon as may be, proceed to carry out the order of the Public Service Commission of the State of Washington made and entered in cause No. 706 before said Public Service Commission September 28, 1913, * * * ."

Further provision was made for the dismissal of the suit.

Subsequently, and after the adjudication in bankruptcy, the Summit Investment Company deeded the property back to the Wenatchee Heights Orchard Company. Claimants now contend that the transfer of the property to the Summit Investment Company was merely an effort on their part to obtain a preference, and that, it having been voluntarily abandoned and undone by them, their claims should be unaffected by reason of anything they may have done. The trustee contends that the transfer was a fraud

upon the creditors of the company and for the purpose of hindering and delaying its creditors.

The Referee rules: [38]

> "The Referee has not overlooked the claim of the trustee that certain transactions between the bankrupt corporation and the Summit Investment Company, in which the note held by L. V. Wells was used as the apparent consideration for the transfer of the property of the bankrupt corporation to said Summit Investment Company amounted to a payment of the note, but in his opinion the property for which the note is claimed to have been surrendered having been recovered by the trustee of the bankrupt estate he cannot receive the benefit thereof and at the same time have the right to claim that the note has been paid. While it is possible that neither party to these transactions between the bankrupt corporation and the Summit Investment Company would have been entitled to relief as against the other, yet relief having been obtained the consideration, though fraudulent, must be returned."

If it be true that both the purpose and effect of this transfer was merely to give L. V. Wells and E. H. McPherson preference over the other creditors, as concluded, the ruling is, doubtless, correct.

20 Cyc. 472–b et seq, 572, 624–K 11, 636;

White vs. Cotzhausen, 129 U. S. 329, at 344 and 345;

U. S. Rubber Co. vs. American Oak Lea Co., 181 U. S. 434, at 446 and 447.

Hutchinson vs. Otis, 190 U. S. 552.

The creditors of the bankrupt were, in the main, those with small holdings under the sale contracts, with unliquidated claims against the corporation and its books were in the sole control of the claimants.

According to claimants' own testimony, the property recovered from the Summit Investment Company was transferred without consideration to that company. The new notes given Wells and McPherson were at the time of that transfer, not yet due and might have been transferred to innocent purchasers. As pointed out, no record of the interest of the Wenatchee Heights Orchard Company was preserved and no acknowledgment of trust by either Gates or the Summit Investment Company was given or required. A false record was made by claimants in the minute-book of the [39] Wenatchee Heights Orchard Company to the effect that Gates had purchased claimants' notes against the Wenatchee Heights Orchard Company, and that, for them, he received the company's property. Claimants must be held to have contemplated the probable result of their acts.

On its face, the Summit Investment Company had become the owner of the principal assets of the Wenatchee Heights Orchard Company, freed from any claim by anyone connected with that company. If by any chance this false record, in the control of claimants, was brought to light, still by it, it had been made to appear that Gates was an innocent holder of the notes before maturity, without notice of any equities on the part of the contract holders, and the Summit Investment Company would be in a like advantageous position.

If the true relation between the Wenatchee Heights

Orchard Company, the Summit Investment Company and L. V. Wells and E. H. McPherson was brought to light, under the circumstances, it would, probably, require more than four months' time after the transfer to do so and a preference thereby be established—especially as the creditors, other than claimants, had principally unliquidated claims, and the company defending against their liquidation, would be in the sole control of claimants Wells and McPherson, and, finally, if discovered, and bankruptcy intervened short of four months, the stand might further be taken that, while the preference had not been gained, yet these claims were unsmirched by reason of these transactions.

The discouragement of creditors, naturally resulting from the apparently hopeless condition of the company, would be likely to result in advantage to claimants, both as creditors and as sole stockholders of the corporation. [40]

Claimant Wells, having testified that the Summit Investment Company was organized to facilitate the transaction of the business of the Wenatchee Heights Orchard Company, when repeatedly pressed to state how the transactions with the Summit Investment Company would facilitate the business of the Wenatchee Heights Orchard Company, gave the following explanation:

> "A. We proposed to carry out the Wenatchee Heights Orchard Company project to take care of the land and the orchards and to perfect the water system, so that the Wenatchee Heights Orchard Company would be able to fulfill all of its contracts to the purchasers of its land. Early

in that year we had—that would be 1911—we had been sued and a judgment had been recovered against us, which we regarded to be entirely unjust; we thought that no person should have any right to recover a judgment aganst the Wenatchee Heights Orchard Company on the grounds that those people had, and we were afraid, since they had recovered a judgment, we were afraid that others might possibly follow their course, and it was my idea to conserve the resources of the Wenatchee Heights Orchard Company in such a manner as to prevent the possibility of a repetition of what we had experienced in the matter of this judgment.

Q. In other words—

A. Just a minute, until I get through. That was my idea; we were afraid that possibly there might have been—might be others who would be encouraged by that fact that Mr. Hotchkin had obtained a judgment and would enter suits and thus dissipate the resources of the Wenatchee Heights Orchard Company in a way that we thought was not just. It was our idea to accomplish what we had started out to do, to furnish a water right which would be unquestioned in every particular and to carry out our contracts with our land purchasers perfectly; but if others who had not proper claims against the company were able to recover on judgments, necessarily the assets of the Wenatchee Heights Orchard Company would have been dissipated before we could carry out our contracts; and it was my idea

to surround these resources by such safeguards as would prevent their being dissipated in that manner, and to use them for the purpose of carrying out the contracts of the company in regard to their water rights and cultivation of the land.

Q. In other words, you were seeking a method by which you could prevent any person who secured a judgment against your company from levying upon this property and selling it?

A. It was not my idea to prevent any person having a judgment, a just judgment, against the company—

Q. You were to be the judge of whether it was a just judgment or not?

A. Well, now, I am not saying that. [41]

Q. And you were trying to put these assets in such shape so that anybody who secured a judgment for the reasons that Hotchkin did would be unable to touch that property, isn't that true?

A. No, that was not my idea exactly. My idea was to put the matter in such shape as to discourage persons who thought of entering suits for causes of that kind."

It therefore appears that the scheme was, stripped of its euphony, to hinder and delay creditors.

The Referee did not find such clear and convincing proof of gross over-valuation of the property acquired by the company on its organization as to warrant a finding of fraud, avoiding the indebtedness to the claimants, then assumed by the company.

This conclusion is approved and, as the notes are shown by claimants' testimony, to have been at all

times in their possession; never acquired by Gates and, therefore, never surrendered to the Wenatchee Heights Orchard Company, they will not be treated as paid; but it does not follow that the only disadvantage suffered, on account of the transaction, by Wells and McPherson, is the loss of their now claimed preference.

By their acts, both as creditors and for the corporation, said company's property was transferred in such a way, as found by the Referee, that neither they nor the corporation could recover it. The other creditors, alone, could compel its return to the corporation. They did so. To now hold that the claimants, who were parties to such transfer, may resort to the property they helped put out of the reach of the corporation and themselves, the same as the other creditors, would neither tend to encourage innocent creditors to diligence, nor discourage those dishonestly inclined from scheming for an unfair advantage. [42]

The claims of Wells and McPherson have not been shown to be fraudulent, and will, therefore, be treated as legitimate. But while there is a wide range between one with a purely fabricated claim and one who seeks to secure a preference for a valid claim, yet the holder of a valid claim may lend it and himself to the accomplishment of a fraud, and both be affected thereby.

20 Cyc. 487–c and 638.

Claimants might be diligent in securing the advantage of a preference, without prejudicing their claims. They might even be secret in so doing, if

there was no duty on their part to speak. (U. S. Rubber Co. vs. Am. Oak Lea Co., 181 U. S. 434, at 447, *supra.*) But if the creditor and the corporation do undertake to speak, they are bound to speak truly, and if in these corporation minutes they spoke falsely in a matter naturally tending to their advantage and the deception and disadvantage of other creditors, no element of actual fraud appears lacking, even though the claim evidenced by the notes be not fabricated, but a genuine debt.

It is not necessary to determine the effect of a confessed valuation now of the transferred property not exceeding the creditor's established claims. Such transactions as these should be tested by the situation, action and intention of the parties at the time they acted, and the then probable effect of such action. Though the Court has not found such clearly established fraud in these notes, at the inception of the claim, in the evidence, as to void them, yet they were not free from question, and city property of the nature of that transferred is liable to sudden fluctuations in value. [43]

At the time of the transfers to the Summit Investment Company, it was not unreasonable to calculate that the property had a present value, tested by its potential value, in excess of the established claims. The same rule that saved claimants from condemnation for over-valuation of the property amounting to fraud at the organization of the corporation will obtain in testing their conduct in the matter of the transfer of this property. Their conduct shows that they considered it of greater value than their claims.

Arriving at that not then unreasonable conclusion, the effect of their conduct will be tested as though their conclusion was a verity in establishing actual fraud upon their part.

The fact that, after other creditors brought a suit against Gates, the Summit Investment Company, Wells and McPherson to recover the property transferred, for the Wenatchee Heights Orchard Company, claimants, before judgment consented to return the property, does not purge the transaction of fraud. It cannot be considered a voluntary surrender. These claimants are denied the right to have any of the proceeds of the property recovered applied to the satisfaction of their claims until the claims of other creditors are satisfied.

The conclusion of the Referee that, upon the present evidence, the Trustee should not be directed to comply with the Public Service Commission's order for the increase of the water supply to the present contract holders is affirmed. The penalty imposed by the state law for a failure to comply with the Commission's order cannot be made the basis of a claim in this bankruptcy proceeding. (Section 57–J of the Bankruptcy Act.) If such an order were made, and the expense incurred of increasing the water supply, the claims of the contract [44] holders for damages for a shortage of water would still exist. A different question would be presented if the petition was for authority to compromise the unliquidated claims of the contract holders for such damage by complying with the order and increasing the water supply.

The Referee's order is modified as indicated above.

[Indorsed]: Decision on Review of Referee's Order Denying Trustee's Petition and Allowing Claims of Wells & McPherson in Part. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Dec. 3, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [45]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 5025.

In the Matter of WENATCHEE HEIGHTS ORCHARD COMPANY,

Bankrupt.

Order Modifying Order of Referee upon Claim of L. V. Wells.

This cause coming on to be heard upon the petitions for review of the claimant L. V. Wells and J. B. Lincoln, as Trustee, and the Court being fully advised and having delivered a written opinion herein, which was filed herein, now, in pursuance of said written opinion, it is

CONSIDERED, ORDERED AND DECREED by the Court that said order of the Referee allowing the said claim of L. V. Wells in the sum of $56,389.16 be and the same hereby is approved, subject to the following modifications, that is to say, that the said L. V. Wells is denied the right to receive any dividends on his said claim out of the proceeds realized from the assets conveyed by the said Wenatchee

Heights Orchard Company to the Summit Investment Company until all other creditors have been satisfied in full.

Dated this 11th day of December, A. D. 1913.

EDWARD E. CUSHMAN,
Judge.

O. K. as to form only.

T. D. OGDEN.

[Endorsed]: Order Modifying Order of Referee upon Claim of L. V. Wells. Filed in the United States District Court, Western District of Washington. Dec. 11, 1913. Frank L. Crosby, Clerk. Ed. M. Lakin, Deputy. [46]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 5025.

In the Matter of WENATCHEE HEIGHTS ORCHARD COMPANY,
Bankrupt.

Petition for Appeal.

To the Honorable EDWARD E. CUSHMAN, Judge of Said Court.

Comes now L. V. Wells, a claimant in the above-entitled matter, and feeling himself aggrieved by the order made and entered in this cause on the 11th day of December, 1913, modifying the order of the Referee heretofore made herein upon his claim, does hereby appeal from said order to the Circuit Court of

Appeals for the 9th Circuit for the reasons specified in the assignment of errors which is filed herewith, and he prays that his appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the 9th Circuit, sitting at San Francisco, California; and your petitioner further prays that the proper order touching the security to be required of him to perfect his appeal be made.

CORWIN S. SHANK,
H. C. BELT,
Attorneys for Claimant L. V. Wells.

The above petition granted and the said appeal allowed upon giving bond as required by law in the sum of $500.00.

Dated this 11th day of December, 1913.

EDWARD E. CUSHMAN,
Judge. [47]

[Endorsed]: Petition for Appeal. Filed in the United States District Court, Western District of Washington. Dec. 11, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [48]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 5025.

In the Matter of the WENATCHEE HEIGHTS ORCHARD CO., a Corporation,

Bankrupt.

Petition on Appeal of J. B. Lincoln, Trustee in Bankruptcy of the Estate of the Wenatchee Heights Orchard Company.

Comes now J. B. Lincoln, as Trustee of the Estate of the Wenatchee Heights Orchard Company, bankrupt, and feeling himself, as such Trustee, aggrieved by the judgment made and entered in this cause on the 10th day of December, A. D. 1913, allowing the claim of L. V. Wells and affirming, except as therein stated, the order of the Referee upon said claim, presents and files herewith his Assignments of Error, and does hereby appeal from said order to the Circuit Court of Appeals of the United States, for the Ninth Circuit, and prays that an appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said judgment was made, duly authenticated, may be sent to the United States Court of Appeals for the Ninth Circuit, sitting at San Francisco, California.

RAYMOND D. OGDEN,
Attorney for Trustee.
WALTER SCHAFFNER,
Attorney for Trustee.

Dec. 19, 1913.

The foregoing claim of appeal is allowed.

EDWARD E. CUSHMAN,
District Judge.

[Endorsed]: Petition for Appeal, J. B. Lincoln, Trustee. Filed in the United States District Court, Western District of Washington. Dec. 20, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [49]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 5025.

In the Matter of WENATCHEE HEIGHTS ORCHARD COMPANY,

Bankrupt.

Assignment of Errors [of L. V. Wells].

And now on this the 11th day of December, A. D. 1913, comes L. V. Wells, the claimant mentioned in the order entered in the above cause, on the 11th day of December, A. D. 1913, modifying the order of the Referee heretofore made in this cause upon his said claim, and says that the said order is erroneous and unjust to the said claimant.

First: Because the said order provides that the said L. V. Wells be denied the right to receive any dividends on his said claim out of the proceeds realized from the assets conveyed by the said Wenatchee Heights Orchard Company to the Summit Investment Company until all other creditors have been satisfied in full.

WHEREFORE the said claimant L. V. Wells prays that the said decree be reversed in so far as it modifies the order of the Referee as hereinabove set out, and that the District Court be instructed to confirm the order of the Referee without any modification as aforesaid.

CORWIN S. SHANK,
H. C. BELT,
Attorneys for Claimant L. V. Wells.

[Endorsed]: Assignment of Errors. Filed in the United States District Court, Western District of Washington. Dec. 11, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [50]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 5025.

In the Matter of the WENATCHEE HEIGHTS ORCHARD CO., a Corporation,

Bankrupt.

Assignments of Error by Trustee in Bankruptcy to Allowance of Claim of L. V. Wells.

And now on the 18th day of December, A. D. 1913, comes J. B. Lincoln, as Trustee in Bankruptcy of the Estate of the Wenatchee Heights Orchard Company, bankrupt, by Raymond D. Ogden and Walter Schaffner, his attorneys, and says that the order entered in the above cause on the 10th day of December, A. D. 1913, affirming the order of the Referee,

except as in said order modified, is erroneous and against the just rights of said Trustee in Bankruptcy, for the following reasons:

Because the order made on the 10th day of December, A. D. 1913, allows the claim of L. V. Wells for Fifty-six Thousand Three Hundred and Eighty-nine and 16/100 Dollars ($56,389.16), the allowance of which said claim is erroneous and unjust, for the following reasons:

(1) That the notes attached to said proof of claim upon which the same was based were executed without any consideration whatsoever.

(2) That the note for Fifty-seven Thousand Dollars ($57,000), dated the 21st day of September, 1911, attached to said proof of claim and upon which the said claim is in part based, has been fully paid and satisfied.

(3) That nothing whatsoever is due to the said L. V. Wells from said Wenatchee Heights Orchard Company, but that, on the contrary, the said L. V. Wells is indebted to said Wenatchee [51] Heights Orchard Company and was at the time of the filing of the petition herein in the sum of Seventy-five Thousand Dollars ($75,000) for his subscription to the capital stock of said bankrupt.

(4) That the sum of Forty Thousand Dollars ($40,000) of said claim was based upon an alleged agreement whereby L. V. Wells sold to the Wenatchee Heights Orchard Company certain real estate, together with 63 shares of the capital stock of the Spring Hill Irrigation Company, and was to receive

in payment therefor 750 shares of the capital stock of said Wenatchee Heights Orchard, and there was to be paid to said Wells the sum of Forty Thousand Dollars ($40,000) and to certain other parties mentioned in said agreement the sum of Twenty-two Thousand Two Hundred and Forty Dollars ($22,240); that in truth and in fact the said land sold to said Wenatchee Heights Orchard Company by said L. V. Wells was not worth to exceed the sum of Fifty Thousand Dollars ($50,000); that at the time such sale was made said L. V. Wells was the president and one of the Trustees of the Wenatchee Heights Orchard Company and the owner of all the capital stock and one E. H. McPherson, the claimant, who, according to said agreement, was to receive the sum of Fifty-eight Hundred Fifty Dollars ($5,850), was the only other Trustee or officer of said corporation when said agreement was made; said L. V. Wells and E. H. McPherson knew that said land was worth not to exceed the sum of Fifty Thousand Dollars ($50,000) and said contract was entered into by them on behalf of the Wenatchee Heights Orchard Company and themselves fraudulently, and with the design and purpose of causing it to appear that the said capital stock of the Wenatchee Heights Orchard Company was fully paid, whereas, in truth and in fact, nothing whatever was ever paid thereon.

(5) That the said L. V. Wells is the legal owner and [52] holder of Three Hundred and Seventy-five (375) shares of the capital stock of the Wenatchee *Heights Company* of the par value of Thirty-seven

Thousand Five Hundred Dollars ($37,500) on which nothing has been paid, and that said Wells is now indebted to the bankrupt in said sum of Thirty-seven Thousand Five Hundred Dollars ($37,500) for said stock.

(6) That said L. V. Wells is indebted to the bankrupt herein in a large sum of money, the exact amount of which the Trustee is not now able to ascertain, from moneys illegally and improperly withdrawn by him for and on account of said commissions claimed by him.

(7) That the evidence shows that the said L. V. Wells has been guilty of such fraud and unfair dealings and conduct in the management of the affairs of the Wenatchee Heights Orchard Company that he is now debarred and estopped from claiming or attempting to claim any sum or sums whatsoever due him as a creditor of the Wenatchee Heights Orchard Company.

WHEREFORE, said J. B. Lincoln, Trustee of the estate of the Wenatchee Heights Orchard Company, prays that said order, judgment and decree affirming the action of the Referee in the allowance of the claim of L. V. Wells in any capacity whatsoever *by* reversed, and the said Court may be directed to enter a decree reversing the action, ruling and order of the Referee in allowing in any capacity whatsoever the claim of L. V. Wells, and that a decree may be made and entered disallowing *in toto*

the claim of L. V. Wells.

RAYMOND D. OGDEN,
Attorney for Trustee.
WALTER SCHAFFNER,
Attorney for Trustee. [53]

[Endorsed]: Assignment of Errors, J. B. Lincoln, Trustee. Filed in the United States District Court, Western District of Washington. Dec. 20, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [54]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 5025.

In the Matter of WENATCHEE HEIGHTS ORCHARD COMPANY, a Corporation, Bankrupt.

Bond on Appeal of L. V. Wells.

KNOW ALL MEN BY THESE PRESENTS, That we, L. V. Wells, as principal, and American Surety Company of New York, as surety, acknowledge ourselves to be indebted to J. B. Lincoln, as Trustee in Bankruptcy of the estate of Wenatchee Heights Orchard Company, a bankrupt, appellee in the above cause, in the sum of Five Hundred Dollars ($500.00), conditioned that

WHEREAS, on the eleventh day of December, A. D. 1913, in a proceeding had in the above-entitled court and cause, wherein the above-named L. V. Wells was a claimant, a decree was rendered against

the said L. V. Wells and the said L. V. Wells has obtained an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse said decree;

NOW, if the said L. V. Wells shall prosecute his said appeal to effect and answer all costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

Dated this eleventh day of December, 1913.

L. V. WELLS.
By H. C. BELT,
His Attorney.

AMERICAN SURETY COMPANY OF NEW YORK.
By EDWARD J. LYONS,
Resident Vice-President.

[Seal] S. H. MELROSE,
Resident Assistant Secretary.

Approved December 12, 1913.

EDWARD E. CUSHMAN,
Judge. [55]

[Indorsed]: Bond on Appeal of L. V. Wells. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Dec. 12, 1913. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [56]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 5025.

In the Matter of the WENATCHEE HEIGHTS ORCHARD CO., a Corporation,

Bankrupt.

Order Allowing Appeal [of J. B. Lincoln, Trustee].

This matter coming on to be heard upon the petition of J. B. Lincoln, Trustee of the estate of the Wenatchee Heights Orchard Company, bankrupt, for the allowance of an appeal to the Circuit Court of Appeals for the Ninth Circuit, from an order entered on the 10th day of December, A. D. 1913, affirming the order of the Referee except as therein modified, and it appearing that said petition is in proper form and filed within the time required by statute, and that said petitioner has duly filed with said petition his Assignments of Error,—

It is hereby ORDERED that the said appeal be and the same hereby is allowed.

Entered in open court this 19th day of December, A. D. 1913.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: Order Allowing Appeal, J. B. Lincoln, Trustee. Filed in the United States District Court, Western District of Washington. Dec. 20,

1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [57]

In the United States Circuit Court of Appeals in and for the Ninth Judicial Circuit.

No. 5025.

In the Matter of WENATCHEE HEIGHTS ORCHARD COMPANY, a Corporation,

Bankrupt.

Citation [on Appeal of S. V. Wells].

United States of America, to J. B. Lincoln, as Trustee in Bankruptcy of the Estate of Wenatchee Heights Orchard Company, Greeting:

You are hereby notified that in a certain proceeding had in the above-entitled cause in bankruptcy in the United States District Court in and for the Western District of Washington, Northern Division, wherein L. V. Wells is claimant, an appeal has been allowed to the said L. V. Wells to the United States Circuit Court of Appeals for the Ninth Circuit, and you are therefore hereby cited and admonished to be and appear in said court, at San Francisco, on or before the 31st day of December, 1913, to show cause, if any there be, why the order and decree appealed from should not be corrected and speedy justice done the parties in that behalf.

WITNESS the Honorable EDWARD E. CUSHMAN, Judge of said Court, this 12th day of December, A. D. 1913.

[Seal] EDWARD E. CUSHMAN,

Judge.

We hereby admit service of the within paper this 12th day of December, 1913.

RAYMOND D. OGDEN,
WALTER SCHAFFNER,
Attorneys for Trustee. [58]

[Indorsed]: No. 5025. United States District Court for the Western District of Washington, Northern Division. In the Matter of Wenatchee Heights Orchard Company, a Corporation, Bankrupt. Citation to J. B. Lincoln on Appeal. Filed in the United States District Court, Western District of Washington, Dec. 16, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. Corwin S. Shank, H. C. Belt, Attorneys for L. V. Wells, Alaska Building, Seattle. [59]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 5025.

In the Matter of WENATCHEE HEIGHTS ORCHARD CO., a Corporation,

Bankrupt.

Citation [on Appeal of J. B. Lincoln, as Trustee].

To L. V. Wells, Claimant:

You are hereby notified that in a certain proceedings had in the above-entitled cause in bankruptcy, in the United States District Court for the Western District of Washington, Northern Division, wherein J. B. Lincoln, as Trustee in Bankruptcy of the Estate of the Wenatchee Heights Orchard Company,

is resisting the allowance of the claim of L. V. Wells, as claimant, an appeal has been allowed to the said J. B. Lincoln, Trustee in Bankruptcy of the Estate of the Wenatchee Heights Orchard Company in the United States Circuit Court of Appeals for the Ninth Circuit, and you are hereby cited and admonished to be and appear at a session of the United States Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, State of California, said district, within thirty (30) days from and after the date hereof pursuant to a petition on appeal, Assignment of Error, filed with the clerk's office in the District Court of the United States for the Western District of Washington, Northern Division, in the matter of the Wenatchee Heights Orchard Co., bankrupt, to show cause, if any there be, why the judgment rendered in said cause affirming, except as herein modified, the Findings of the Referee in Bankruptcy, allowing the claim **[60]** of L. V. Wells, as claimant for the sum of $56,389.16, should not be reversed as in said petition of appeal set forth, and why said order and decree appealed from should not be corrected, as in said Petition of Appeal and Assignments of Error set forth, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD E. CUSHMAN, Judge of said Court, on the 19th day of December, A. D. 1913.

[Seal] EDWARD E. CUSHMAN,
Judge.

Copy of the within Citation received and due ser-

vice of same acknowledged this 20th day of Dec., 1913.

CORWIN S. SHANK and
H. C. BELT,
Attorneys for Wells.

[Endorsed]: No. 5025. Citation J. B. Lincoln, Trustee. In the U. S. District Court Western District of Washington, Northern Division. In the Matter of the Estate of Wenatchee Heights Orchard Company, Bankrupts, vs. J. B. Lincoln, Trustee. Filed in the United States District Court, Western District of Washington. Dec. 20, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. Walter Schaffner, Raymond D. Ogden, Postoffice and Office Address. Offices: 507 Lowman Bldg., Seattle, Washington, Attorneys for Trustee. **[61]**

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 5025.

In the Matter of WENATCHEE HEIGHTS ORCHARD COMPANY, a Corporation,
Bankrupt.

Praecipe for Record on Appeal of L. V. Wells.

To Frank L. Crosby, Clerk of Said Court:

Kindly incorporate into the transcript of the record upon the appeal of L. V. Wells from the order entered in said court and cause upon December 11, 1913, upon his claim, the following portions of the record:

(1) Order of adjudication of bankruptcy.
(2) Order of reference.
(3) Claim of L. V. Wells.
(4) Objections of Trustee to claim of L. V. Wells.
(5) Order of Referee upon claim of L. V. Wells.
(6) Petition of Trustee for revision of Referee's order upon claim of L. V. Wells.
(7) Petition of L. V. Wells for revision of Referee's order upon his claim.
(8) Opinion of Judge Cushman upon claim of L. V. Wells (filed December 3, 1913).
(9) Order of Judge upon claim of L. V. Wells.
(10) Petition of L. V. Wells on appeal.
(11) Assignments of Error by L. V. Wells.
(12) Bond of L. V. Wells on appeal.
(13) Citation on appeal of L. V. Wells.
(14) Statement of evidence upon claim of L. V. Wells.

Dated this 12th day of December, 1913.

CORWIN S. SHANK,
H. C. BELT,
Attorneys for Claimant Wells. **[62]**

Service of the within paper is hereby admitted this 12th day of December, 1913.

WALTER SCHAFFNER and
R. D. OGDEN,
Attorneys for Trustee.

[Endorsed]: Praecipe for Record on Appeal of L. V. Wells. Filed in the United States District Court, Western District of Washington. Dec. 12, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. **[63]**

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 5025.

In the Matter of WENATCHEE HEIGHTS ORCHARD COMPANY, a Corporation, Bankrupt.

Praecipe for Record on Appeal of J. B. Lincoln, Trustee.

To Frank L. Crosby, Clerk of said Court:

Kindly incorporate into the transcript of the record upon the appeal of J. B. Lincoln, Trustee of the Wenatchee Heights Orchard Company, Bankrupt, from an order entered in said cause upon December 10th, 1913, sustaining the order of the Referee, except as therein modified, in the allowance of the claim of L. V. Wells:

(1) Petition in bankruptcy.
(2) Form of real estate contract of Wenatchee Heights Orchard Company.
(3) Order of adjudication of bankruptcy.
(4) Order of reference.
(5) Claim of L. V. Wells.
(6) Objections of the Trustee to claim of L. V. Wells.
(7) Order of Referee upon claim of L. V. Wells.
(8) Petition of Trustee for revision of Referee's order upon claim of L. V. Wells.
(9) Petition of L. V. Wells for revision of Referee's Order upon his claim.

(10) Opinion of Judge Cushman upon the claim of L. V. Wells filed December 3, 1913.
(11) Order of the Judge upon claim of L. V. Wells.
(12) Petition of J. B. Lincoln, Trustee, on appeal.
(13) Assignments of error by J. B. Lincoln, Trustee. [64]
(14) Order granting appeal.
(15) Citation on appeal of J. B. Lincoln, Trustee.
(16) Statement of evidence of J. B. Lincoln, Trustee.

RAYMOND D. OGDEN,
WALTER SCHAFFNER,
Attorneys for J. B. Lincoln, Trustee.

Copy of the within praecipe received and due service of same acknowledged this 19th day of Dec. 1913.

CORWIN S. SHANK. and
H. C. BELT,
Attorneys for Wells.

[Endorsed]: Praecipe for record on appeal of J. B. Lincoln, Trustee. Filed in the United States District Court, Western District of Washington. Dec. 19, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [65]

[Certificate of Clerk U. S. District Court to Transcript of Record.]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 5025.

In the Matter of the WENATCHEE HEIGHTS ORCHARD COMPANY, a Corporation, Bankrupt.

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the District Court of the United States for the Western District of Washington, do hereby certify the foregoing 94 typewritten pages, numbered from 1 to 94, inclusive, to be a full, true, correct and complete copy of so much of the record and proceedings in the above and foregoing entitled cause as is called for by the praecipes of the attorneys for the Claimant and Trustee, as the same remain of record and on file in the office of the clerk of the said court, and that the same constitute the transcript of record on appeal from the District Court of the United States for the Western District of Washington, to the Circuit Court of Appeals for the Ninth Judicial Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the appellants for preparation and certification of the typewritten transcript of record issued

to the United States Circuit Court of Appeals [66] for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's fee (Sec. 828 R. S. U. S. as Amended by Sec. 6, Act of March 2, 1905) for making transcript of the record for printing purposes 223 folios at 30c per folio	$66.90
Certificate to certified copy of typewritten transcript of record	.30
Seal to said certificate	.40
	$67.60

I hereby certify that the above cost for preparing and certifying record amounting to $67.60 has been paid to me by Messrs. Corwin S. Shank and H. C. Belt, attorneys for L. V. Wells, Raymond D. Ogden, and Walter Schaffner, attorneys for Trustee.

IN WITNESS WHEREOF I have hereto set my hand and affixed the seal of said District Court at Seattle, in said District, this 24th day of December, A. D. 1913.

[Seal] FRANK L. CROSBY,
Clerk. [67]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN BANKRUPTCY—No. 5025.

In the Matter of WENATCHEE HEIGHTS ORCHARD COMPANY,

Bankrupt.

Statement of Evidence upon Claim of L. V. Wells.

BE IT REMEMBERED that on the 3d day of September, 1913, the objections of J. B. Lincoln, as Trustee of Wenatchee Heights Orchard Company, the above-named bankrupt, to the claim of L. V. Wells came regularly on for hearing before Hon. John P. Hoyt, Referee in Bankruptcy, the said claimant being present in person and being represented by H. C. Belt, his attorney, and the Trustee being present in person and being represented by Raymond D. Ogden and Walter Schaffner, his attorneys, whereupon the following proceedings were had:

It was stipulated that all testimony of L. V. Wells and E. H. McPherson taken in this cause since the adjudication in bankruptcy should be considered upon this hearing, subject to any objections on the ground of materiality or relevancy.

[Testimony of E. H. McPherson.]

The testimony of E. H. McPHERSON which was thus offered was taken upon June 11, 1913, upon his examination as an officer of the bankrupt, and was to the effect, among other things, that he was at all times since the organization of the bankrupt the secretary and a trustee of said bankrupt; that at the time of the organization of the bankrupt he was interested in certain portions of the property afterwards conveyed to the bankrupt known as the Walker property consisting of 160 acres, [68*—1†]

*Page-number appearing at foot of page of certified Transcript of Record.

†Original page-number appearing at foot of page of Statement of Evidence as same appears in Certified Transcript of Record

(Testimony of E. H. McPherson.)

and the Wheeler property consisting of about 320 acres; that this was all included in the plats except about 10 acres of waste land in the Walker tract and about two-thirds of the Wheeler tract; that this interest was the result of other deals had between Mr. Wells and himself; that his interest in this property was about one-fourth or one-third; that they had paid $12,000 or $15,000 for the Walker tract, and $30,000 for the Wheeler tract; that he had no interest in the rest of the property; that A. C. McPherson was his brother and that he owned another piece of property which they had bought from him paying therefor $7,500; this tract contained 80 acres, of which 20 or 30 acres was good land; that W. G. Steward was interested in the Walker and Wheeler tracts; that the $5,850 which the minutes provided he was to receive did not represent all of the amount that he had in the property; that he had put in as close as he could figure about $15,000. Thereupon he testified as follows:

"Q. And your proportion was one-fourth or one-third?

A. Yes, something like that; we had figured that out and it was the result of several different deals. We had been in several different deals and sold out and made a profit, and later it was necessary to put in some more money to keep it going and set out the orchard; we had set out one hundred acres of orchard, so it was rather a complicated amount.

Q. Was there any record kept of these transac-

(Testimony of E. H. McPherson.)

tions? A. There was at the time; yes.

Q. Do you know what has happened to them?

A. At the time we organized the company we cleaned up the entire transaction and divided it up in the way of stock in the company. In other words, we assumed the property to be worth a certain amount.

Q. How much did you estimate all the property to be worth?

A. We estimated the property to be worth two hundred thousand.

Q. Two hundred thousand? A. Yes.

Q. That was encumbered for fifty thousand?

A. Yes." [69—2]

The witness further testified that the interest of Mr. Steward in the Walker and Wheeler tracts was about the same as his own, but later stated—

"A. (Interrupting.) I am mistaken about that; his interest would not be as big as mine.

Q. What interest did he have?

A. About half as large.

* * * * * * * * * * *

Q. For that property you got a credit of $5,850 and 37,500 in par value of stock?

A. Well, I think there was something else for that. I had some other deal with Mr. Wells which was turned in mine.

Q. The company got nothing else? A. No.

* * * * * * * * * *

Q. How did you arrive at that $5,850?

A. I couldn't exactly tell you now. It was, as I

(Testimony of E. H. McPherson.)

say, a very complicated arrangement, the result of several deals we had been interested in for two or three years, and I could not recall now just what it was. I wouldn't attempt to describe it.

* * * * * * * * *

Q. Had any declaration of trust been issued or signed by Mr. Wells on this property showing that he had it in trust for you and Mr. Stewart?

A. I think we had an agreement signed between us is all.

Q. Do you know where that agreement is?

A. No, I am not sure.

Q. You had a copy of it?

A. Yes. I may have it yet.

Q. Did Mr. Wells ever make any accounting to you in writing of the various transactions surrounding this property?

A. Why, I expect he did at the time.

Q. Have you that now?

A. I don't recall whether I have it or not.

Q. How was this forty thousand dollars arrived at which Mr. Wells was to receive in cash?

A. Well, he had a larger interest in the property than I did. That was figured out to take care of what he had, because there was one tract he owned himself, separate from this. [70—3]

Q. How big was that tract, do you know?

A. It would be the east half, I think, of section 26, and there is some old orchard on it; and part of the west half of section 26; about 160 or a couple hundred acres. Yes, there was more than that, because

(Testimony of E. H. McPherson.)

part of it was waste land. There were several hundred acres, including the waste land. I couldn't say how much.

Q. You didn't attend to any of the buying of any of this property, did you?

A. No, I don't think so. Mr. Wells did that.

Q. Mr. Wells was running that himself?

A. Yes.

Q. How much did you put into this pool or combination, or whatever we may call it, in the beginning?

A. Oh, the beginning was way back three or four years before that, and at that time values were cheap and it didn't take much to get in. We went across the river and took options on three or four hundred acres, intending to irrigate it, and afterwards sold it out to the Wenatchee Canal Company without putting in so very much, so the amount we put in would only be several hundred dollars at that time, because values were advancing rapidly, things were jumping. You could get in on a shoestring, as they say, at that time, and perhaps make a big profit in a few months.

Q. Did you put in any more after that?

A. I think I did, at various times."

The witness further testified that most of the purchasing and most of the expenditure of the money had been done by Mr. Wells, but according to the best estimate of the witness there had been expended upon the property for purchase and improvement about $115,000.

The witness further testified that the property

(Testimony of E. H. McPherson.)

which was conveyed to the Summit Investment Company by the bankrupt was conveyed merely for the purpose of vesting the title to the said property in the Summit Investment Company; that B. E. Gates never had possession of the notes mentioned in the communication from him to the Wenatchee Heights Orchard Company, and that the said notes were never canceled.

The witness further testified upon cross-examination that the irrigated real estate market in Wenatchee in 1905 and 1906 was booming; that people were doubling their money [71—4] in a year or two; that he and Mr. Wells when they turned this property into the company estimated the irrigable lands with the water right which they had to be worth $250 an acre; that in the Wenatchee Valley proper raw land under ditch was at the time selling from $400 to $600 an acre.

[Testimony of L. V. Wells.]

The testimony of L. V. WELLS which was thus offered was taken upon June 23, 1913, and June 24, 1913, upon his examination as an officer of the bankrupt, and it is to the effect, among other things, that he was at all times since the organization of the bankrupt the president and a trustee of said bankrupt; that the first interest which he acquired in the land subsequently deeded to the Wenatchee Heights Orchard Company was the west half of section 25 and the northeast quarter of section 26, and the north half of the southwest quarter of section 34–22–20,

(Testimony of L. V. Wells.)

together with 13 shares of water stock, which was acquired in 1903 from Gunn and Brown in exchange for other property at a valuation of $25,000; that he next acquired the southeast quarter of section 26 together with 10 shares of water stock from Percy Walker, paying therefor $12,000 in cash; that with Mr. A. C. McPherson, in 1905, he purchased the northeast quarter of section 34 from Mr. Cole together with 5 shares of water stock; that next they purchased the Wheeler property of 320 acres in 1905 together with 20 shares of water stock for $15,000; that of all of this property there was about 600 acres subsequently platted as the Wenatchee Heights Orchard tracts, which was practically all tillable land and the rest was hillside of the value of about $15 per acre being useful for pasturage and grazing; that at the time this property was platted in 1907 there were about 30 acres [72—5] of bearing orchard, and five sets of cheap farm buildings, together with ten acres which were just coming into bearing; that subsequent to the purchase of the property and prior to the incorporation of the bankrupt, they had set out forty more acres of land, which at the time was four years old, at an expense in the neighborhood of $4,000, had built two new houses at a cost of $1,000; had also set out ten acres of orchard, which was then two years old, at an expense of $750; and that they had done considerable other work—breaking, fencing, improving old orchard, and purchasing farm implements. Thereupon he testified as follows:

"Q. (By Mr. OGDEN.) Now, Mr. Wells, at the

(Testimony of L. V. Wells.)

time of your incorporation you incorporated for how many shares? What's the capital stock?

A. What incorporation is this?

Q. The Wenatchee Heights Orchard Company?

A. Seventy-five hundred.

Q. A total of seventy-five hundred shares?

A. Yes.

Q. For that you turned over to this incorporation this property with a total expenditure of this $68,150? A. Yes.

Q. Upon the property at that time there was a mortgage of fifty thousand dollars, was there not?

A. Yes.

Q. That left $18,150. Of that $18,150, Mr. Wells, the property which we have heretofore designated as the northeast quarter of 34, had never been paid for, had it? A. At the time it was turned over?

* * * * * * * * *

Q. Then, Mr. Wells, from the $68,150 you should subtract $7,500 as a part of the money originally expended in the purchase of this property, should you not?

A. I don't know whether we should or not. It depends on what you are getting at.

Q. You have never paid for that, have you?

A. You asked me whether you should subtract that. [73—6]

Q. I am trying to ascertain the exact amount of money in that property, expended by you prior to incorporation.

A. I am giving it to you as near as I can.

(Testimony of L. V. Wells.)

Q. Well, if the company gave their note and paid for it, you didn't pay for it, did you?

A. If the company bought something and paid for it, certainly then I didn't buy it and pay for it.

Q. Very well, then, Mr. Wells, we will subtract this amount from $18,150, the balance of your equity in this property after the mortgage upon it is taken off, and you have $14,650 equity in that property, which was the actual amount of money in the corporation at the time you turned it over to the company.

Mr. BELT.—I think it is rather unfair to the witness, asking his opinion as to questions of law.

The COURT.—The question is only one as to the fact; it is not a question of law; he is asking if that is the fact; the witness has testified to the amount expended and now he is asking the witness how much it would leave; it is a question of subtracting and the witness can subtract as well as anybody.

Q. For this $14,650, Mr. Wells, you received, you and Mr. McPherson received from the Wenatchee Heights Orchard Company seventy-five thousand dollars worth of capital stock?

A. Do you want me to say yes?

Q. It is up to you.

A. Well, I won't say yes to that question because that property had been purchased, a part of it, a considerable time prior to the date of the incorporation of the company, and land values had been increasing—

Q. Now, Mr. Wells—

(Testimony of L. V. Wells.)

Mr. BELT.—Just a second. I object to counsel interrupting the witness.

Q. I am not asking you what the property increased in value at all. I am getting at the actual money invested; we will get at the other later on.

A. You want to know how much money we made by making the transfer?

Q. You answer my question. You did receive seventy-five thousand dollars for it, did you not? [74—7]

The witness further testified that the property was turned into the bankrupt in payment of the $75,000 of capital stock, a note for $40,000 to himself, a note to E. H. McPherson for $5,850, a note to A. C. McPherson for $7,500, and a note to Mr. Steward for $8,890; that they thereupon proceeded to sell the land except what had already been set out to orchard for $500 an acre; that the bearing orchard of about 30 acres was sold for about $20,000, so that the total amount received from the property was $340,000; that a large portion of this land was sold upon long time contracts, the bankrupt agreeing to plant and care for an orchard upon the land until the contracts matured; that subsequently they traded certain of these contracts upon which there was $65,000 unpaid to a Mrs. Stevens for Seattle property, and Mr. Beninghausen and Mr. McElwain are now the successors in interest of Mrs. Stevens; they also traded $15,916 of these contracts to Mr. Ryer for other Seattle property, and $9,000 more to a Mr. Douglas for other Seattle property.

(Testimony of L. V. Wells.)

The witness further testified that A. C. McPherson received about $2,000 in cash and a note for $7,500 as payment in full for his investment; that his investment consisted of a half interest in the Cole 40 acres and a half interest in 80 acres in section 34; that Steward got about $2,000 in cash and a note for $8,890 for his interest; that his interest was scattered around through several pieces of property; that when they organized the company they estimated the value of the property to be $200,000; that he did not recall the values placed upon the various tracts; it was his recollection that Mr. Steward's interest was larger than that of Mr. E. H. McPherson, but that Mr. E. H. McPherson received his interest in the corporation and his note as "a result of [75—8] some other deals Mr. McPherson and I had personally." Thereupon he testified as follows:

"Q. At the time the settlement was arrived at you had an accounting between you, didn't you, all of you? A. An accounting?

Q. Yes. A. Yes, sir.

Q. And that was put in writing, the figures?

A. Well, yes, we made figures.

Q. Where are they?

A. Well, I don't know. The figures that we made we made on pieces of paper and I don't know whether I could find those now or not; whether they were ever kept.

Q. You don't think they were kept?

A. I don't know whether they were kept."

The witness further testified that about the time

(Testimony of L. V. Wells.)

of the organization of the bankrupt this property had been valued by R. F. Holm, who was then in the real estate business at Wenatchee, by George A. Virtue of Seattle, Arthur Ward of Seattle, Mr. W. C. Steward, who is now at Boise, Idaho, A. C. McPherson and E. H. McPherson.

The witness further testified that the note for $57,000 mentioned in the proposal of B. E. Gates was the same note which is attached to his proof of claim herein, but the said note had never been in the possession of B. E. Gates and had never been cancelled; that the property which was conveyed by the Wentachee Heights Orchard Company to the Summit Investment Company was conveyed merely for the purpose of vesting the title to the said property in the Summit Investment Company.

The witness further testified that on June 1, 1907, he loaned the bankrupt $4,000; that on April 10, 1908, he loaned the bankrupt $3,000; on April 26, 1908, he loaned the bankrupt $2,200; that on each of these occasions he took [76—9] the bankrupt's note therefor; that the proceeds of the said loans were used in the bankrupt's business, and have never been repaid and were included in his present claim; that on August 12, 1912, he borrowed from the First National Bank the sum of $1,000; on October 11, 1912, he borrowed from the First National Bank the sum of $700; on December 1, 1912, he borrowed from the First National Bank the sum of $250, all of which sums he loaned to the bankrupt and are included in his claim; that on December 12, 1911, he loaned the

(Testimony of L. V. Wells.)

bankrupt the sum of $1,150; that the $50,000 loan which had been placed upon the property was placed upon it by a loan company represented by Mr. Dameyer, who had inspected the property at previous times; that he was familiar with Mr. Dameyer's methods and knew at the time he made this loan his maximum limit of loaning was 33⅓% of his appraised value of the property; that during the summer of 1907 the price of first-class raw lands under ditch around Wenatchee ranged from $300 an acre to $500 or $600 an acre, and that the estimated cost of bringing an orchard into bearing from the raw land was $100 an acre.

Thereupon the minutes of a special meeting of the stockholders and board of trustees of the Wenatchee Heights Orchard Company held upon October 10, 1911, were introduced in evidence. These minutes were as follows:

[Minutes of Special Meeting of Stockholders, etc., of Wenatchee Heights Orchard Co., October 10, 1911.]

Wenatchee, Wash., Oct. 10, 1911.

A special meeting of the stockholders of the Wenatchee Heights Orchard Company was held at the office of the company in accordance with a notice duly issued. There were present L. V. Wells owning 375 shares, and E. H. McPherson owning 375 shares of the capital stock of the company.

The following proposal was received from B. E. Gates of Seattle, Wash.

"Having purchased the following promissory notes

[77—10] made by your company, viz.: One dated Sept. 21 to L. V. Wells for $57,000, due ninety days from date, and one dated Sept. 21 to E. H. McPherson for $18,000, due ninety days from date, and being desirous of collecting the same I propose to take the following described property in full satisfaction of the said notes and accumulated interest:

"All of Block 1, C. D. Hillman's Pacific City Division Number 2, value $5,000.

"Lot 14 and the North ½ of Lot 15, Block 17, East Park Addition to the City of Seattle, value $12,000.

"The South 58 feet of Lot 4, Block 122 A. A. Denny's Broadway Addition to the City of Seattle, value $38,000.

"The S. W. ¼ of Sec. 26, T. 22 N. of R. 20 E., W. M., value $14,000.

"All of Section 25, T. 22 N. of R. 20 E., W. M., excepting the W. ½ of the SW. ¼ of the SW. ¼ of the SW. ¼ of said Section and excepting all that portion of said Section included in the Wenatchee Heights Orchard Tracts and the First Addition to the Wenatchee Heights Orchard Tracts according to the recorded plat thereof. Also all of the W. ½ of Sec. 25, and all of the E. ½ of Sec. 26, T. 22, N. of R. 20 E., W. M., excepting that portion of the said section included in the Wenatchee Heights Orchard Tracts according to the recorded plat thereof. Value $6,000.

"I agree to assume the mortgage against the above property, amounting to $33,500."

After a careful consideration of the proposal, on motion duly made by a stockholder, seconded and unanimously carried, all stock voting in favor, it was

decided to accept the said proposal. There being no further business the meeting adjourned.

L. V. WELLS.
E. H. McPHERSON.

Seattle, Wash., Oct. 10, 1911.

A special meeting of the board of trustees of the Wenatchee Heights Orchard Company was held at the office of the Company in accordance with a notice duly served. The following trustees were present being, all the trustees of the company, L. V. Wells and E. H. McPherson.

The following resolution was introduced, and upon motion duly made and seconded, was unanimously adopted:

"Whereas, the proposal of B. E. Gates to accept certain property of the company in payment of notes given by the company to L. V. Wells and E. H. McPherson, and held by him, having been accepted by the stockholders, therefore, Resolved, that the President and Secretary be and are hereby authorized to complete the transfer in acordance with said proposal.

There being no further business the meeting adjourned.

E. H. McPHERSON,
Secretary.

L. V. WELLS,
President." [78—11]

Thereupon the minutes of a special meeting of the board of trustees of the Wenatchee Heights Orchard Company held upon December 7, 1911, were intro-

duced in evidence. The said minutes were as follows:

[Minutes of Special Meeting of Board of Trustees of Wenatchee Heights Orchard Co., etc., December 7, 1911.]

Wenatchee, Wash., Dec. 7, 1911.

A special meeting of the board of trustees of the Wenatchee Heights Orchard Company was held at the office of the company, there being present L. V. Wells and E. H. McPherson, being all of the Trustees of the Company.

Upon motion duly made by a trustee, and seconded, the following resolution was unanimously adopted:

"Whereas, the trustees and stockholders of the company have heretofore accepted a proposition made by B. E. Gates to exchange certain property for notes given by the company to L. V. Wells and E. H. McPherson, and

"Whereas, a request has been received from the said B. E. Gates, that the said property be deeded to the Summit Investment Company,

"Resolved, that the President and Secretary be and are hereby authorized to execute the necessary deeds as referred to in a resolution adopted by the trustees on Oct. 10, 1911, to the Summit Investment Company, instead of to B. E. Gates."

There being no further business the meeting adjourned.

E. H. McPHERSON,
Secretary.

L. V. WELLS,
President."

It was thereupon stipulated that the testimony of B. E. Gates taken prior to the adjudication of bankruptcy should be considered at this hearing in so far as it was material.

[Testimony of B. E. Gates.]

The testimony of B. E. GATES which was thus considered was taken upon February 11, 1913, and it was to the effect, among other things, that he had been president and trustee of the Summit Investment Company; that all of the property owned by the Summit Investment Company had come from the bankrupt; that he had received certificates of stock in the said company from L. V. Wells. Thereupon he testified as follows:

"Q. Did you pay anything for those certificates?

A. In cash, no, sir. [79—12]

Q. Did you give anything for them?

A. There was a transaction worked out by counsel, but the details of that I can't give you because I never had the records.

Q. Did you part with any property?

A. No, sir. There were some notes which had been assigned to me which were cancelled.

Q. Notes of whom?

A. Those were the notes of the Wenatchee Heights Orchard Company, I think.

Q. And in return for this stock you then cancelled the notes? A. Yes, sir.

Q. How much did those notes amount to?

A. I don't remember.

Q. Approximately? A. I couldn't give it.

Q. Can't you give us some idea?

(Testimony of B. E. Gates.)

A. No, I cannot.

Q. Was it as much as five thousand?

A. Oh, more than that, I should imagine.

Q. Can you give us within five thousand of how much that amounted to? A. I couldn't.

Q. Was it as much as fifty thousand?

A. I should imagine about that.

Q. Somewhere in the neighborhood of fifty thousand? A. I think so.

Q. To whom were those notes issued originally; to you? A. No.

Q. To whom?

A. I think those notes were originally isued to L. V. Wells.

Q. And you got them from Wells? A. Yes.

Q. What did you pay Wells for those notes?

A. Well, they were turned over to me for services rendered.

Q. In connection with what?

A. Handling the project.

Q. What services did you render in that connection?

A. Well, I have been selling properties. I made several deals for them which enabled them to get the money to pay off their indebtedness.

* * * * * * * * *

[80—13]

Q. In payment for what services you had rendered were those notes received by you from Mr. Wells?

A. Well, to go into that transaction I think I am the wrong witness.

(Testimony of B. E. Gates.)

Q. Well, just go ahead, and state.

A. Because I can't tell you.

Q. You don't know what you received?

A. The whole transaction was worked up by counsel and he kept all the records.

Q. By whom? A. By counsel.

Q. Who? A. George Bailey.

Q. Representing whom?

A. Summit Investment Company.

Q. What was your understanding or your reason for getting this fifty thousand dollars of notes, or approximately that amount—what did you understand you were getting those for?

A. Well, I suppose for general good will more than anything else."

The witness further testified that all of the stock was held in his name but one share which was held by his wife; that he and his wife were the trustees of the Summit Investment Company; that he was president and she was secretary and treasurer, and there were no other officers or trustees; that he had executed no declaration of trust with relation to the shares of stock, or to the property of the company; that at the time of the execution of the agreement between McElwain, Ryer and Beninghausen on the one side, and L. V. Wells and McPherson on the other, he indorsed the stock in blank and turned it over to Mr. McClure, and that he had never seen the stock since; that he had always accounted for the rentals from the property and turned them over to the Wenatchee Heights Orchard Company as the property of said company.

[Deposition of L. V. Wells, Taken Prior to Adjudication in Bankruptcy.]

Thereupon it was stipulated that the deposition of L. V. WELLS, taken prior to the adjudication in bankruptcy should be [81—14] considered at this hearing in so far as it was material. The deposition of L. V. Wells which was thus offered was taken on February 23, 1913, and was to the effect, among other things, as follows:

That the Wenatchee Heights Orchard Company was organized in December, 1906; that he had been the president from its organization, and shortly after its organization had transferred to the company certain property in payment for all of its capital stock; that of this property he had acquired 480 acres, together with 15 shares of water stock in 1903, paying therefor $25,000; that he then paid $12,000 for a quarter section, together with 10 shares of water stock, and about $28,000 for the remainder; at the time he purchased this there was one mortgage of about $7,000, which was not included in the figures previously given, so that the total original cost of the land was about $72,000; that he put a mortgage of $50,000 on the property, of which amount some went to pay portions of the purchase price and the remainder went on the improvement of the property; that he turned this property in to the company subject to the $50,000 mortgage in payment of the capital stock, and subject to the following indebtedness: $40,000 to himself; $5,850 to E. H. McPherson; $8,890 to W. G. Steward; $7,500 to A. C. McPherson; of the 1200

(Deposition of L. V. Wells.)

acres which he turned over about 830 were tillable; that the Summit Investment Company was organized for the purpose of having conveyed to it the property of the Wenatchee Heights Orchard Company; that Mr. Gates had no real interest in the Summit Investment Company.

The witness further testified as follows:

"A. We proposed to carry out the Wenatchee Heights Orchard Company project to take care of the land and the orchards and to perfect the water system, so that the Wenatchee Heights Orchard Company would be able to fulfill all of its contracts [82—15] to the purchasers of its land. Early in that year we had—that would be 1911—we had been sued and a judgment had been recovered against us, which we regarded to be entirely unjust; we thought that no person should have any right to recover a judgment against the Wenatchee Heights Orchard Company on the grounds that these people had, and we were afraid, since they had recovered a judgment, we were afraid that others might possibly follow their course, and it was my idea to conserve the resources of the Wenatchee Heights Orchard Company in such a manner as to prevent the possibility of a repetition of what we had experienced in the matter of this judgment.

Q. In other words—

A. Just a minute, until I get through. That was my idea; we were afraid that possibly there might have been—might be others who would be encouraged by that fact that Mr. Hotchkin had obtained a judg-

(Deposition of L. V. Wells.)

ment and would enter suits and thus dissipate the resources of the Wenatchee Heights Orchard Company in a way that we thought was not just. It was our idea to accomplish what we had started out to do, to furnish a water right which would be unquestioned in every particular and to carry out our contracts with our land purchasers perfectly; but if others who had not proper claims against the company were able to recover on judgments, necessarily the assets of the Wenatchee Heights Orchard Company would have been dissipated before we could carry out our contracts; and it was my idea to surround these resources by such safeguards as would prevent their being dissipated in that manner, and to use them for the purpose of carrying out the contracts of the company in regard to their water rights and cultivation of the land.

Q. In other words, you were seeking a method by which you could prevent any person who secured a judgment against your company from levying upon this property and selling it?

A. It was not my idea to prevent any person having a judgment, a just judgment, against the company—

Q. You were to be the judge of whether it was a just judgment or not?

A. Well, now, I am not saying that.

Q. And you were trying to put those assets in such shape so that anybody who secured a judgment for the reasons that Hotchkin did would be unable to touch that property? Isn't that true?

(Deposition of L. V. Wells.)

A. No, that was not my idea exactly. My idea was to put the matter in such shape as to discourage persons who thought of entering suits for causes of that kind."

The witness further testified that the notes mentioned in the minutes of the meetings of October 10, 1911, never had been in the possession of Mr. B. E. Gates, and were not canceled as a result of the said transaction. That conveyances were [83—16] made to the Summit Investment Company of the property mentioned in the said minutes pursuant to the resolutions therein set forth, but that all the rentals arising from the said property continued to be paid into the treasury of the Wenatchee Heights Orchard Company.

That on December 24, 1912, a suit was instituted in the Superior Court of King County, Washington, against the Wenatchee Heights Orchard Company, Summit Investment Company, Wells, McPherson and Gates, and their respective wives, for the purpose of obtaining the appointment of a receiver and setting aside the transfers made to the Summit Investment Company. That G. Beninghausen was appointed a temporary receiver in said action. That he had no intimation of such a suit being brought before it was brought. That immediately upon learning of the bringing of said suit he went to Seattle and conferred with the people who had brought the suit, to wit, Mr. Ryer and Mr. Elwain and Mr. Beninghausen, the receiver, and that they thereupon entered into an agreement under which the stock of the Summit Invest-

(Deposition of L. V. Wells.)

ment Company was turned over to Mr. Beninghausen, and it was agreed that all of the assets of the Summit Investment Company were at all times the assets of the Wenatchee Heights Orchard Company, and were to be applied in carrying out the corporate purposes of the said company.

Thereupon the contract of December 30, 1912, between William P. McElwain, F. E. Ryer and G. Beninghausen, parties of the first part, and L. V. Wells and E. H. McPherson, parties of the second part, was admitted in evidence. The portions of the said contract which are material hereto are as follows:

[Excerpts from Contract of December 30, 1912, Between McElwain et al. and Wells et al.]

WHEREAS, The Summit Investment Company is a corporation organized under the laws of the State of Washington, with a capital stock of Seventy-five Thousand Dollars, the sole stockholders and sole trustees of said corporation being B. E. Gates and Nellie B. Gates, his wife, the said Gates and wife having no interest in said capital stock or the property of said [84—17] Summit Investment Company; and

WHEREAS, All of the property, assets and effects of the said Summit Investment Company are in fact the property, assets and effects of the Wenatchee Heights Orchard Company, the said Summit Investment Company holding same as trustee for said Wenatchee Heights Orchard Company; and,

WHEREAS, The parties of the first part are the owners and holders of certain land and water contracts issued by the said Wenatchee Heights Orchard

Company, and are also the owners of certain sums due and to grow due from certain persons who have purchased land and water contracts from the said Wenatchee Heights Orchard Company, the aggregate of the interests of the parties of the first part being a very large sum; and,

WHEREAS, It has been agreed by and between the parties hereto that the board of trustees of the Summit Investment Company shall be increased, as provided by law and the articles of incorporation of said Summit Investment Company, from three persons to five persons, and that the said William P. McElwain, F. E. Ryer, G. Beninghausen, L. V. Wells and E. H. McPherson shall constitute said board of trustees, and that to each of said persons shall be issued a qualifying share of stock in the Summit Investment Company, and that the balance of said stock shall be placed with some person as trustee to be held by such trustee irrevocably until the obligations of the said Wenatchee Heights Orchard Company shall have been performed or until such prior time as the parties hereto shall agree that said stock shall be delivered by said trustee to such person or persons as the parties hereto shall appoint; and,

WHEREAS, for the purpose of effectuating the foregoing objects, the said B. E. Gates and Nellie E. Gates, his wife, have transferred to the parties hereto and to their nominees all of said capital stock of said Summit Investment Company and have resigned as officers and as trustees of the said Summit Investment Company; and,

WHEREAS, It has further been agreed between the parties hereto that the new board of trustees of the said Summit Investment Company shall so administer the affairs of that company that the said Wenatchee Heights Orchard Company shall as occasion demands be suplied with such funds as may be required to perform the obligations of said Wenatchee Heights Orchard Company, so far as the same can be supplied from the assets now held by the said Investment Company; and,

WHEREAS, The said William P. McElwain and F. E. Ryer have heretofore instituted a certain action in the Superior Court of the State of Washington for King County against the said Wenatchee Heights Orchard Company and the said Summit Investment Company and other persons, in which action the said G. Beninghausen has been appointed temporary receiver of the said Wenatchee Heights Orchard Company and its property, assets and effects and it has been agreed that said proceeding shall be dismissed and the said receiver discharged;

Now, therefore, it is hereby agreed as follows:

1. That to each of the parties hereto there shall forthwith be issued one share of the capital stock of the Summit [85—18] Investment Company, and that the remainder of said capital stock shall be deposited with G. Beninghausen as trustee, said stock to be held by such trustee irrevocably until the obligations of the said Wenatchee Heights Orchard Company are performed, or until such prior time as all of the parties hereto shall agree that said trustee shall be discharged and said stock delivered

to such person or persons as shall be named by all of the parties hereto. In case the said trustee shall be unwilling or unable to act, the parties hereto, or a majority of them, shall appoint some suitable and proper person to act as trustee.

2. That such proceedings shall forthwith be taken that the board of trustees of said Summit Investment Company shall be increased in number from three to five, and that all of the parties hereto shall become members of said increased board of trustees, and that the capital stock held by each of the parties hereto and by said G. Beninghausen or his successor, shall be voted for a continuance in office of said trustees or their nominees (with the right in each of said trustees to nominate his own successor, if successor be desired), until the obligations of the said Wenatchee Heights Orchard Company shall have been performed, or until the parties hereto shall have otherwise agreed.

3. That the new board of trustees of the said Summit Investment Company shall so administer the affairs of that company that the said Wenatchee Heights Orchard Company shall as occasion demands be supplied with such funds as may be required to perform the obligations of said Wenatchee Heights Orchard Company so far as the same can be supplied from the assets now held by the said Summit Investment Company, or the proceeds of said assets.

It was further stipulated that the trustee in bankruptcy now has the title to all the property formerly owned by the Summit Investment Company, the said property having been conveyed to the said

trustee by deeds dated June 11, 1913, executed by the officers of the Summit Investment Company pursuant to resolutions duly passed by the stockholders and board of trustees of said Summit Investment Company.

It was further stipulated that all rentals arising from the said property owned by the Summit Investment Company had been paid to the Wenatchee Heights Orchard Company, or to the receiver appointed by the State court, or to the trustee in bankruptcy. [86—19]

[Testimony of J. B. Lincoln.]

J. B. LINCOLN testified as follows: That he is the trustee in bankruptcy in this case; that the value of the tillable land which could be irrigated from the ditches of the bankrupt "would be increased about $400. per acre if properly irrigated."

[Testimony of F. E. Ryer.]

F. E. RYER testified as follows: That he was one of the plaintiffs who brought the suit against the bankrupt in December, 1912; that prior to bringing the said suit he made an examination of the affairs of the bankrupt and that up to the month of October, 1911, the bankrupt was in a prosperous financial condition, its assets at that time being worth many thousands of dollars, and its liabilities much less than its assets.

[Additional Testimony of L. V. Wells.]

L. V. WELLS testified as follows: That the first threat of damage suits for failure to fulfill contracts for furnishing water was in the spring of 1910, when

(Testimony of L. V. Wells.)

one Hotchkin commenced a damage suit and recovered a judgment, which judgment was paid; the next threat of a damage suit was in the fall of 1910 when Dana Hotchkin, the son of the former man, began an action and recovered a judgment; that the said case was then on appeal to the Supreme Court and that a supersedeas bond had been given which had been signed by Mr. McPherson and the witness as sureties; that up to October, 1911, the current indebtedness of the bankrupt had been small at all times.

The minutes of a meeting of the board of trustees of the Wenatchee Heights Orchard Company, held on March 9, 1907, were offered in evidence, and the portion of said minutes which are material are as follows:

[Minutes of Meeting of Board of Trustees of Wenatchee Heights Orchard Co., March 9, 1907.]

Seattle, Wash., March 9, 1907.

The first meeting of the Board of Trustees of the **[87—20]** Wenatchee Heights Orchard Co. was held at the office of the company in room 507 Bailey Building in the city of Seattle, Washington, on this 9th day of March, 1907, at the hour of two o'clock P. M., pursuant to an agreement and notice hereinbefore spread on the records of the company at which there were present the following named trustees, to wit: L. V. Wells, G. A. Virtue and Arthur Ward, being all of the trustees of the said company.

* * * * * * * * *

The following written proposal was submitted to

the Board of Trustees:

To the Wenatchee Heights Orchard Company.

I hereby offer to sell to you the following tract of land located about three miles from Wenatchee, Washington, to wit:

W.½ of Sec. 25, E.½ Sec. 26, W.½ N. W. ¼ and N. E. ¼ N. W. ¼ and N. W. ¼ N. E. ¼ Sec. 35, E.½ and N. ½ S. W. ¼ Sec. 34, all in T. 22 R. 20 E. W. M., containing 1200 acres more or less, together with 63 shares of the capital stock of the Spring Hill Irrigation Co., all for the sum of Seventy-five Thousand Dollars ($75,000) subject to a mortgage for Fifty Thousand Dollars ($50,000) which you are to assume and pay in addition to the amount proposed to be paid to me, also subject to the following claims which are a part of the purchase price of the said land and which are to be assumed and paid by you.

L. V. Wells	$40,000
E. H. McPherson	5,850
W. G. Steward	8,890
A. C. McPherson	7,500

I propose to take in payment for this land 750 shares of the capital stock of the Wenatchee Heights Orchard Co. the same being all of the issue of the stock of the company.

Signed—L. V. WELLS.

The above letter having been read and discussed, the following resolution was unanimously adopted;

Resolved: That the proposal contained in the above communication be and is hereby accepted in all of its conditions and that the officers of the company issue 750 shares of the capital stock of the

Wenatchee Heights Orchard Co. to L. V. Wells in payment for a deed to the above land, subject to the mortgage and claims against the same. [88—21]

It further appears from the exhibits in this cause that the land which was transferred to this company at its organization was land which needed irrigation in order to make it productive. That the water right which accompanied this land was represented by 68 shares of the capital stock of the Spring Hill Irrigation Company, which owned certain water rights. This company did not sell water but divided it among its shareholders according to each shareholder's holdings. The irrigation plant of the irrigation company now includes a dam of approximately 18 feet, which impounds the waters of Stemilt Creek, so that the water from the reservoir formed by the dam may be used in the latter part of the summer when the creek becomes low.

Immediately after the incorporation of the bankrupt about 650 acres of land of the bankrupt which were suitable for orchard purposes were platted, and nearly all of this was sold either under contracts running on an average of 6½ years, or for cash. Both contracts and deeds provided that the bankrupt was to furnish 2 acre-feet of water per acre per year to the purchasers thereof. In addition to the furnishing of water, the bankrupt was to plant, cultivate and care for the property which was sold under contract until the purchasers received deeds for their property.

In the year 1911 one Hotchkin, the owner of a

tract in this addition which embraced one of the old orchards, brought suit against the bankrupt on account of failure to furnish the water provided for in his contract, and obtained a judgment for about $1800, which was paid. Thereafter another Mr. Hotchkin, son of the former man, the owner of 10 acres of the old orchard immediately adjoining, brought suit and recovered judgment. Shortly after the hearing in the [89—22] latter Hotchkin case in the lower court, other owners of orchard tracts cited the bankrupt to appear before the Public Service Commission of the State of Washington and show cause why it should not increase its water supply. Whereupon a hearing was had and an order of the Public Service Commission was entered finding that the bankrupt had not furnished the water called for by its contracts and requiring it to furnish plans for increasing its water supply. Thereupon the bankrupt furnished a plan whereby the Spring Hill Irrigation Company should increase the height of its dam from 18 to 30 feet, thus making additional storage capacity. This plan was approved by the Public Service Commission. The estimates for the construction of this improvement varies from $10,000 to $16,000, of which the share of the bankrupt would be from $5,000 (estimate of Mr. Wells) to $8,000 (estimate of the engineers of the Trustee). [90—23]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN BANKRUPTCY—No. 5025.

In the Matter of WENATCHEE HEIGHTS ORCHARD COMPANY,

Bankrupt.

Order Approving Statement of Evidence.

I, EDWARD E. CUSHMAN, the Judge of the said court before whom the objections of J. B. Lincoln, as Trustee in Bankruptcy of the above-named bankrupt to the claim of L. V. Wells was tried, do hereby certify, both parties being represented by counsel in open court, that the foregoing is a true and complete and properly prepared statement of all the evidence essential to the decision of the questions presented by the appeal of L. V. Wells and by the appeal of J. B. Lincoln, the said Trustee, from the order hereinbefore entered herein upon the claim of L. V. Wells, and I do hereby approve the same as the statement of the evidence in said matter for the purpose of the said appeals, and do order that the same shall become a part of the record for the purposes of the said appeals.

Done in open court this 23d day of December, 1913.

By the Court,
EDWARD E. CUSHMAN,
Judge.

O. K.—R. D. OGDEN,
WALTER SCHAFFNER. [91]

[Endorsed]: In Bankruptcy. No. 5025. United States District Court for the Western District of Washington, Northern Division. In the Matter of Wenatchee Heights Orchard Company, Bankrupt. Statement of Evidence Upon Claim of L. V. Wells. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Dec. 13, 1913. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy.

In the United States Circuit Court of Appeals in and for the Ninth Judicial Circuit.

No. 5025.

In the Matter of WENATCHEE HEIGHTS ORCHARD COMPANY, a Corporation,

Bankrupt.

Citation [on Appeal of L. V. Wells (Original)].

United States of America to J. B. Lincoln, as Trustee in Bankruptcy of the Estate of Wenatchee Heights Orchard Company, Greeting:

You are hereby notified that in a certain proceeding had in the above-entitled cause in bankruptcy in the United States District Court in and for the Western District of Washington, Northern Division, wherein L. V. Wells is claimant, an appeal has been allowed to the said L. V. Wells to the United States Circuit Court of Appeals for the Ninth Circuit, and you are therefore hereby cited and admonished to be and appear in said court at San Francisco on or before the 31st day of December, 1913, to show cause, if any there be, why the order and decree ap-

pealed from should not be corrected and speedy justice done the parties in that behalf.

WITNESS the Honorable EDWARD E. CUSHMAN, Judge of said court, this 12th day of December, A. D. 1913.

[Seal] EDWARD E. CUSHMAN.
Judge. [92]

We hereby admit service of the within paper this 12th day of December, 1913.

RAYMOND D. OGDEN,
WALTER SCHAFFNER,
Attorneys for Trustee.

[Endorsed]: No. 5025. United States District Court for the Western District of Washington, Northern Division. In the Matter of Wenatchee Heights Orchard Company, a Corporation, Bankrupt. Citation to J. B. Lincoln, on Appeal. Filed in the United States District Court, Western District of Washington. Dec. 16, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 5025.

In the Matter of WANATCHEE HEIGHTS ORCHARD CO., a Corporation,

Bankrupt.

Citation [on Appeal of J. B. Lincoln, as Trustee (Original).]

To L. V. Wells, Claimant:

You are hereby notified that in a certain proceed-

ings had in the above-entitled cause in bankruptcy, in the United States District Court for the Western District of Washington, Northern Division, wherein J. B. Lincoln, as Trustee in Bankruptcy of the Estate of the Wenatchee Heights Orchard Company, is resisting the allowance of the claim of L. V. Wells, as claimant, an appeal has been allowed to the said J. B. Lincoln, Trustee in Bankruptcy of the Estate of the Wenatchee Heights Orchard Company in the United States Circuit Court of Appeals for the Ninth Circuit, and you are hereby cited and admonished to be and appear at a session of the United States Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, State of California, said district, within thirty (30) days from and after the date hereof pursuant to a petition of appeal, Assignment of Error, filed with the clerk's office in the District Court of the United States for the Western District of Washington, Northern Division, in the matter of the Wenatchee Heights Orchard Co., bankrupt, to show cause, if any there be, why the judgment rendered in said cause affirming, except as herein modified, the Findings of the Referee in Bankruptcy, allowing the claim of L. V. Wells, as claimant, for the sum of $56,389.16, should not be reversed as in said petition of appeal set forth, **[93]** and why said Order and Decree appealed from should not be corrected, as in said Petition of Appeal and Assignments of Error set forth, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD E. CUSHMAN, Judge of said Court on the 19th day of December, A. D. 1913.

[Seal] EDWARD E. CUSHMAN,
Judge. [94]

Copy of the within citation received and due service of same acknowledged this 20th day of Dec., 1913.

CORWIN S. SHANK and
H. C. BELT,
Attorneys for Wells.

[Endorsed]: Original. No. 5025. In the U. S. District Court, Western District of Washington, Northern Division. In the Matter of the Estate of Wenatchee Heights Orchard Company, Bankrupts, Plaintiff, vs. J. B. Lincoln, Trustee. Citation—J. B. Lincoln, Trustee, Defendant. Filed in the United States District Court, Western District of Washington. Dec. 20, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy.

[Endorsed]: No. 2358. United States Circuit Court of Appeals for the Ninth Circuit. L. V. Wells, Appellant, vs. J. B. Lincoln, as Trustee in Bankruptcy of the Estate of Wenatchee Heights Orchard Company, a Corporation, Bankrupt, Appellee, and J. B. Lincoln, as Trustee in Bankruptcy of the Estate of the Wenatchee Heights Orchard Company, a Corporation, Bankrupt, Appellant, vs. L. V. Wells, Appellee. In the Matter of Wenatchee Heights Orchard Company, a Corporation, Bank-

rupt. Transcript of Record. Appeals from the United States District Court for the Western District of Washington, Northern Division.

Received and filed December 27, 1913.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

L. V. WELLS,

Appellant,

vs.

J. B. LINCOLN, as Trustee in Bankruptcy of the Estate of WENATCHEE HEIGHTS ORCHARD COMPANY, a Corporation, Bankrupt,

Appellee,

and

J. B. LINCOLN, as Trustee in Bankruptcy of the Estate of the WENATCHEE HEIGHTS ORCHARD COMPANY, a Corporation, Bankrupt,

Appellant,

vs.

L. V. WELLS,

Appellee,

In the Matter of WENATCHEE HEIGHTS ORCHARD COMPANY, a Corporation, Bankrupt.

Brief of Appellant L. V. WELLS, upon his Appeal.

Appeal from the United States District Court for the Western District of Washington Northern Division.

STATEMENT OF THE CASE.

This is an appeal from an order of the District Court modifying the order of the referee upon the

claim of L. V. Wells against the estate of the Wenatchee Heights Orchard Company, bankrupt.

The bankrupt was organized in the winter of 1906 and 1907 for the purpose of handling a tract of land in Chelan County, Washington, known as Wenatchee Heights. This tract consisted of about twelve hundred acres, of which about six hundred and fifty acres were in the Plat of Wenatchee Heights Orchard Tracts and the First Addition thereto. This six hundred and fifty acres were orchard lands, which however, required irrigation to make them productive. The water right which accompanied the land was represented by sixty-eight shares of stock in the Spring Hill Irrigation Company, which owned an irrigation system. At the time of the organization of the company there were four men interested in this tract, to-wit: L. V. Wells, E. H. McPherson, W. G. Steward and A. C. McPherson. These men had been acquiring this property since 1903. They held different tracts in different proportions, and had each put in various sums of money at different times. L. V. Wells, however, appears to have owned the bulk of the property, and the most of it stood in his name.

The minutes of the first meeting of the board of trustees of the company (*trans.* p. 98) show that the meeting was held on March 9, 1907, at which were

present all the trustees of the company, to-wit: L. V. Wells, G. A. Virtue and Arthur Ward. At this meeting L. V. Wells submitted a proposal to convey this tract of land together with the water to the company for $187,240, payable as follows: $50,000 by the assumption of a mortgage then on the land, $75,000 by the issuance of the entire capital stock of the company of the par value of that amount, and the incurring of indebtedness to L. V. Wells of $40,000, E. H. McPherson $5,850, W. G. Steward $8,890, and A. C. McPherson $7,500. This offer was accepted and notes were executed to these four persons. This indebtedness to L. V. Wells of $40,000, together with accrued interest thereon, forms a part of the claim of L. V. Wells in dispute in this action.

Thereupon the entire capital stock of the company was issued, one-half to L. V. Wells and the other half to E. H. McPherson. G. A. Virtue and Arthur Ward resigned as trustees and E. H. McPherson was elected a trustee and secretary of the company, and from that time on L. V. Wells and E. H. McPherson were the sole stockholders, trustees and officers of the company. The company thereupon entered upon the selling of its land, selling the land either for cash or upon contract. The company sold along with each tract two acre feet of water per acre,

and with its contract agreed to sell the same amount of water. When the land was sold upon contract, the contract provided that the company should retain possession of the land, plant it to orchard, and cultivate it until deeds should be issued. In this manner sales of land were made aggregating $340,000. As the company needed money, L. V. Wells loaned to the company from his own funds sums aggregating $12,-712.95, taking notes for the most of it bearing 7 per cent interest, and this also forms a part of the claim of L. V. Wells which was approved by both the referee and the judge of the District Court. The remainder of the claim of L. V. Wells consisted of a claim for commissions upon the sale of property, and this was rejected by both the referee and the judge upon the ground that Wells and McPherson being the sole trustees could not make a valid contract with themselves for the payment of a commission. The referee charged against L. V. Wells all the money which had been withdrawn by him since the organization of the company and approved the claim for the balance found to be due in the sum of $56,389.16.

Both the trustee in bankruptcy and the claimant filed petitions for review of this order by the District Court, and upon the said petitions the District Court entered an order affirming the action of the referee

and approving the claim, but ordered that the payment of any dividend upon this claim arising out of a considerable portion, (practically all) of the assets of the bankrupt should be postponed until all other creditors had been paid in full.

The facts upon which the court founded this order are as follows: The business of the bankrupt had proceeded prosperously until the spring of 1910. At that time one Hotchkin, who had purchased a tract of land from the bankrupt company, commenced a suit for damages for alleged failure to furnish the required amount of water called for by his deed. He recovered a judgment which was paid. Then in the fall of 1910, Dana Hotchkin, the son of the former man, also began an action. While this action was pending Wells and McPherson, the officers of the bankrupt corporation, sought to devise a method of discouraging such actions, and thereupon, for the purpose of placing the apparent title of the assets of the company out of the bankrupt corporation, adopted the following procedure. The notes which Wells and McPherson then had were taken up and in their place two notes were issued to each of them. One of these notes to Wells was for $57,000, and one of the notes issued to McPherson was for $18,000. An entry was made upon the records of the bankrupt com-

pany of an offer made by B. E. Gates to the company to take these two notes aggregating $75,000 for a conveyance of practically all of the assets of the bankrupt company to the Summit Investment Company. A resolution accepting this offer was placed upon the records of the company, and thereupon a conveyance of the property was made to the Summit Investment Company, in which B. E. Gates held all the stock excepting one qualifying share which was held by his wife. The two notes of Wells and McPherson, however, were never out of the possession of the payees, there was no intention of cancelling them and they were in fact not cancelled. The property which was deeded to the Summit Investment Company was still handled as the property of the bankrupt, and all the rents accruing therefrom were turned into the bankrupt and used in the corporate business of the bankrupt. There is not the slightest evidence, either direct or circumstantial, and neither the referee nor the district judge found as a fact that the purpose of Wells and McPherson in putting through this deal was other than as stated by Mr. Wells—to discourage further actions for damages.

On December 24, 1912, William P. McElwain and F. E. Ryer, who were interested in this project, without any demand made upon anyone for the setting

aside of this transfer to the Summit Investment Company, brought an action in the Superior Court of King County against the bankrupt, the Summit Investment Company, Wells, McPherson, Gates and their wives for the purpose, among other things, of setting aside this transfer. In that action G. Beninghausen was appointed a temporary receiver upon the ex parte application of the plaintiffs. Six days after the commencement of the action an agreement (*trans.* p. 93) was made between all the parties to that action under which B. E. Gates turned all the stock of the Summit Investment Company over to the said Beninghausen. McElwain, Ryer, Beninghausen, Wells and McPherson were elected trustees of the Summit Investment Company, and all parties agreed that the assets of the Summit Investment Company were in fact the assets of the bankrupt corporation, and were to be applied to the corporate uses of the bankrupt.

This bankruptcy proceeding was instituted upon January 18, 1913, upon the ground of the appointment of a receiver in the state court. Subsequent to the appointment of the trustee in bankruptcy, the officers of the Summit Investment Company, being thereunto duly authorized by both the trustees and the stockholders, conveyed to the said trustee all the assets of the Summit Investment Company without any reservation.

There is not the slightest claim made in this action that any creditor suffered any injury, or that the estate of the bankrupt, subject to distribution among the creditors, was diminished in any respect by any of the dealings connected with the Summit Investment Company. The district judge, however, held that on account of the participation of L. V. Wells in the Summit Investment Company deal the payment of dividends upon his claim, otherwise valid, out of any of the property transferred to the Summit Investment Company, should be postponed until all other creditors were satisfied in full, and this action of the district judge in postponing the claim of L. V. Wells is the action which the appellant assigns as error upon this appeal. Wherefore the appellant makes the following

SPECIFICATION OF ERROR.

Said L. V. Wells assigns as error that the order entered in the said cause on the 11th day of December, 1913, modifying the order of the referee theretofore made in said cause upon his said claim was erroneous and unjust to this appellant, because the said order provides that the said L. V. Wells be denied the right to receive any dividends on his claim out of the proceeds realized from the assets

conveyed by the said Wells to the Summit Investment Company until all other creditors have been satisfied in full.

ARGUMENT.

In this argument we are somewhat handicapped by the fact that the theory of the case which the district judge adopted was not advanced by the trustee either in his objections to appellant's claim before the referee or his petition for revision before the judge and was not argued by trustee's counsel before the judge either by brief or orally, and we therefore have nothing to meet in argument excepting the opinion of the district judge, which is somewhat obscure as to reasons, and very deficient as to authority.

The theory upon which the district judge appears to have acted in this matter is that inasmuch as Wells was guilty of lending his claim to the perpetration of a scheme which might have resulted in hindering, delaying or defrauding some creditor, he should therefore be punished by having his claim postponed to other creditors.

The judge in his opinion makes two citations from *Cyc.* in support of his position (*trans.* p. 46), 20 *Cyc.* 487-*c* and 638.

The first citation is to the effect that a fraudulent conveyance is null and void as to creditors, against which we would never contend. There is not the slightest evidence in this case that anybody ever claimed that any of these assets were anything else but the assets of the bankrupt corporation.

The other citation is to the effect that where a grantee in a fraudulent conveyance is a party to the fraud, he cannot recover, as a condition precedent to the setting aside of the conveyance, any consideration which he may have paid for the conveyance or any sums which he might have paid out for the release of liens upon or improvement of the property fraudulently conveyed. We fail to see how this rule applies in this case, as the claim of the appellant did not originate in any manner in the Summit Investment Company deal. The claimant proves his claim without any reference thereto whatever.

Even this rule, however, is not of universal application, particularly in the federal courts. In *Clements v. Nicholson,* 6 Wall. 299, the Supreme Court of the United States upheld this general doctrine with the following limitation:

"A sale may be void for bad faith though the buyer pays the full value of the property bought. This is the consequence where his purpose is to aid the seller in perpetrating a fraud upon his credit-

ors, and where he buys recklessly, with guilty knowledge. Where the fact of fraud is established in a suit at law, the buyer loses the property without reference to the amount or application of what he has paid, and he can have no relief either at law or in equity. When the proceeding is in chancery, the jurisdiction exercised is more flexible and tolerant. The equity appealed to—while it scans the transaction with the severest scrutiny—looks at all the facts and, giving to each one its due weight, deals with the subject before it according to its own ideas of right and justice. In some instances it visits the buyer with the same consequence which would have followed in an action at law. In others, it allows a security to stand for the amount advanced upon it. In others, it compels the buyer to account only for the difference between the under price which he paid and the value of the property. In others, although he may have paid the full value and the property may have passed beyond the reach of the process of the court, it regards him as a trustee, and charges him accordingly. Where he has honestly applied the property to the liabilities of the seller, it may hold him excused from further responsibility. *The cardinal principle in all such cases is, that the property of the debtor shall not be diverted from the payment of his debts to the injury of his creditors, by means of the fraud.*"

We respectfully submit that this action of the district judge runs counter to the first principle of the Bankruptcy Act. This principle is an absolute equality between all unpreferred and unsecured contract creditors regardless of the origin of their respective claims. Both the referee and the district judge found that the claim of appellant was a valid claim against the bankrupt.

§2 (2) of the Bankruptcy Act gives to bankruptcy courts the power to "allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates." §65 (a) provides that "dividends of an equal per centum shall be declared and paid on all allowed claims, except such as have a priority or are secured," and §65 (e) provides that "a claimant shall not be entitled to collect from a bankrupt estate any greater amount than shall accrue pursuant to the provisions of this act." The mere reading of these sections would seem to show conclusively that there is no power given to the bankruptcy court to rank claimants according to what the judge considers to be their merits or needs. If a creditor has a valid claim against the estate he is entitled to a dividend from the estate equal to the dividend of any other creditor, and no power is given to the bankruptcy court practically to fine him for actions which the bankruptcy court might not approve of, by depriving him of any portion of his dividends.

The Bankruptcy Act further provides what claims, otherwise valid, the court may refuse to approve by §57 (g), which provides that "the claims of creditors who have received preferences, voidable under section sixty, subdivision b, or to whom con-

veyances, transfers, assignments, or incumbrances, void or voidable under section sixty-seven, subdivision e, have been made or given, shall not be allowed unless such creditors shall surrender such preferences, conveyances, transfers, assignments or incumbrances." This we believe is the only section of the Bankruptcy Act which authorizes the bankruptcy court to refuse to approve a claim which otherwise would come within the definition of an allowable debt contained in §63, and this section gives even the creditor who has received a preference the right to prove his claim after the preference has been surrendered.

One thing which will throw considerable light upon the interpretation of this statute upon this subject is a comparison with the portion of the former act of bankruptcy upon the same subject. Section 39 of the original Bankruptcy Act of 1867 provided:

"And if such person shall be adjudged a bankrupt the assignee may recover back the money so paid, conveyed, sold, assigned, or transferred contrary to this Act, provided the person receiving such payment or conveyance had reasonable cause to believe that a fraud on this Act was intended or that the debtor was insolvent; and such creditor shall not be allowed to prove his debt in bankruptcy."

This was amended later, and as so amended appears as Section 5021 Revised Statutes, as follows:

"Provided that the person receiving such payment or conveyance had reasonable cause to believe that the debtor was insolvent and knew that a fraud on this Act was intended and such person, if a creditor, shall not in cases of actual fraud on his part, be allowed to prove for more than a moiety of his debt, and this limitation upon the proof of debts shall apply to voluntary as well as involuntary bankruptcy."

It will thus be seen that the framers of the present Act had before them Acts which provided that in cases of actual fraud the creditor should be mulcted to the extent of all and one-half of his claim. The omission of any such provision in the present Act is cogent proof that it was the intention of the framers of the Act that all claims should stand on an equal footing after preferences had been surrendered, regardless of any fraud in connection with an attempt to obtain a preference.

In this case this claimant prior to the adjudication of bankruptcy joined with all other parties who had any control over the Summit Investment Company in a written acknowledgment that all of the assets of the Summit Investment Company were the assets of the Wenatchee Heights Orchard Company (*trans.* pp. 93 *et seq.*), immediately upon the ap-

pointment of the trustee in bankruptcy the officers of the Summit Investment Company, by the consent of all persons interested, voluntarily conveyed all this property to the trustee in bankruptcy (*trans.* pp. 96, 97), and during all the time this property stood in the name of the Summit Investment Company the rentals arising therefrom had been paid either to the bankrupt or the receiver appointed by the State Court, or to the trustee in bankruptcy (*trans.* p. 97). Most assuredly a creditor after the surrender of what might have been claimed as a preference can be in no worse situation than a creditor who did claim such preference.

The Supreme Court of the United States has repeatedly held that the fact that at some time or other one creditor has attempted to get the better of the other creditors, will not prevent the creditors from ultimately sharing equally in the assets of the debtor. This rule was upheld in several equity cases.

White v. Cotzhausen, 129 U. S. 329.

U. S. Rubber Co. v. American Oak L. Co., 181 U. S. 434.

In *White v. Cotzhausen, supra*, the lower court on the petition of a creditor had set aside certain conveyances and other instruments made for the

benefit of the debtor's mother, sisters and brothers as fraudulent with respect to creditors, and ordered the property to be applied in satisfaction of the plaintiff's claim. The Supreme Court upheld the lower court in so far as setting aside the transfer was concerned, but said:

"It remains only to consider the effect of these views upon the decree below. We have already seen that the circuit court proceeded upon the ground that the conveyances, bill of sale, confession of judgment and transfers by Alexander White, Jr., were made without adequate consideration and with intent to hinder, delay and defraud the appellee. Upon these grounds it gave him a prior right in the distribution of the property. We are not able to assent to this determination of the rights of the parties; for the mother, sisters and brother of Alexander White, Jr., were his creditors, and, so far as the record discloses, they only sought to obtain a preference over other creditors. But their attempt to obtain such illegal preference ought not to have the effect of depriving them of their interest, under the statute, in the proceeds of the property in question, or justify a decree giving a prior right to the appellee. It was not intended by the statute, to give priority of right to the creditors who are not preferred. All that the appellee can claim is to participate in such proceeds upon terms of equality with other creditors."

And the Supreme Court thereupon sent the case back to the lower court with instructions to find the amount due to the creditors who had attempted to make themselves preferred creditors.

In *U. S. Rubber Co. v. American Oak L. Co.*, *supra*, the court closes its opinion with the following language:

"There is a wide difference between the case of a fraud ab initio—such, for instance, as a scheme to enforce a false or pretended indebtedness, so as to remove the assets of an alleged debtor from the reach of his bona fide creditors—and the case of an attempt by bona fide creditors to secure preferences for themselves, but using methods forbidden by statute or by the policy of law. In the former case, undoubtedly, a court of equity will refuse to permit the guilty parties to derive any profit or advantage from the fraudulent arrangement. In the latter case a court of equity will not declare a forfeiture of just debts, or, by postponing them till all other creditors are satisfied, practically confiscate them, but will, while defeating the attempt to obtain a forbidden preference, leave such creditors to use and enjoy the same rights and remedies possessed by other creditors."

The "methods forbidden by statute or by the policy of law" which the Supreme Court there held should not cause these creditors to forfeit their valid claims, consisted in secretly taking judgment notes, and preventing other creditors from obtaining the same preference by having subservient dummies secretly placed in control of the debtor corporation while the debtor corporation continued to do business and incur indebtedness apparently under its old officers, even to the extent of keeping the names of

the old officers upon its stationery. Surely the actions set forth in this case were morally as reprehensible as were the actions of this claimant and his co-officer McPherson in the case at bar, which consisted merely in placing in their corporate minute book a false entry, which never deceived anybody, and which was never used in any attempt to deceive anybody, and the execution and placing upon record of a deed which never injured anybody, and which was never used in any attempt to injure anybody.

The district judge, however, in his opinion states that this scheme might have resulted in the injury of some of the creditors. In the *American Oak Leather Company* case, the scheme there adopted might very well have resulted in injury to other creditors, as was pointed out by the lower court in 77 Fed. 674, as follows:

"The arrangement was not intended to provide means to pay the debt, but solely to provide a legal equipment whereby the entire assets could be quickly seized in case of disaster, and other creditors be prevented from obtaining a like advantage. Had the Fargos been dishonest, they could, under this arrangement, have appropriated to themselves the proceeds of the sales, and left to the holders of these preferential judgment notes, when the catastrophe happened, only the stock unsold, and, during the period of such dishonest appropriation, have effectually foreclosed other creditors by their arrangement with the rubber companies. It is not enough to

say that such a thing did not, in fact, happen, and that the Fargos were not, in fact, dishonest. The point is, did the rubber companies make such a dishonest appropriation an easy and natural opportunity to the debtor? If so, the transaction is, in law, a fraud. The law looks beyond the specific instance under review to the example such an instance suggests to the trading world, and to the frauds that might cover themselves under the opportunities of such an example. The arrangement under consideration is, in its practical aspects, an effectual, secret lien upon a stock of goods in trade, under circumstances that justify the trading world in giving security to the trader to which he is not entitled, and is, therefore, a much stronger case even than *Robinson v. Elliott.*"

In the interpretation of the bankruptcy law, we respectfully submit that the Supreme Court of the United States has clearly held that the only valid reason for refusing approval to a debt which comes within the provisions of Section 63 is that the creditor is still retaining one of the preferences mentioned in Section 57 g.

Hutchinson v. Otis, Wilcox & Company, 190 U. S. 552;

Keppel v. Tiffin Savings Bank, 197 U. S. 356;

Page v. Rogers, 211 U. S. 575.

In *Hutchinson v. Otis, Wilcox & Co.*, 190 U. S. 552, a creditor having taken judgment against the bankrupt, attached debts due to the bankrupt, and obtained satisfaction of its judgment thereby, and

entered full satisfaction upon the record in the court. Subsequently Otis, Wilcox & Co. paid over to the trustee the full amount of the respective debts, and filed a claim in bankruptcy for the amount paid back. The Supreme Court said:

"When Otis, Wilcox & Co. paid the debts out of which they had received satisfaction, they undid the satisfaction, and the trustee in bankruptcy knew it. We see no sufficient ground on which he can deny the consequence that the right to prove revived."

In *Keppel v. Tiffin Savings Bank*, the Circuit Court of Appeals for the sixth circuit propounded to the Supreme Court the question:—"Can a creditor of a bankrupt who has received a merely voidable preference and who has in good faith retained such preference until deprived thereof by the judgment of a court upon a suit of the trustees, thereafter prove the debt so voidably preferred?"

The Supreme Court answered this question in the affirmative, saying:

"It is argued, however, that courts of bankruptcy are guided by equitable considerations, and should not permit a creditor who has retained a fraudulent preference until compelled by a court to surrender it, to prove his debt and thus suffer no other loss than the costs of litigation. The fallacy lies in assuming that courts have power to inflict penalties, although the law has not imposed them."

Counsel for the trustee may attempt to distinguish this case by asserting that the Supreme Court relied upon the "good faith" contained in the question propounded. In the later case, however, of *Page v. Rogers*, 211 U. S. 575, there is not the slightest suspicion of good faith in the decision of the court. On the contrary, in the decision in this case of the Circuit Court of Appeals for the sixth circuit contained in 140 Fed. 596, it appears that there were strong evidences of fraud, a claim through an altered trust deed, uncertainty of testimony as to when this trust deed was delivered and whether it ever was delivered, and many other suspicious circumstances pointing to fraud and bad faith, if nothing worse, and in summing up its opinion thereon the Circuit Court of Appeals stated (p. 605):

"Taking all the facts and circumstances of the case together, we are not convinced that the court below erred in holding this mortgage invalid for want of good faith, irrespective of whether it was intended to go into effect when delivered in 1899 under the agreement against registration. That agreement, we are convinced, was made for the purpose of enabling I. B. Merriam to hold himself out as the owner of this coal land. This he did. He was thereby enabled to continue in business for several years; his debt constantly increasing. The fact that this was a secret lien gave this property the appearance of being unincumbered, and was the moving inducement of some of his existing creditors to grant delay

by extension and renewal. The debtor actively represented this land as an available asset which he was in constant expectation of selling, and that the proceeds would pay all his debts and disincumber his other property. These representations operated to quiet his existing creditors and to obtain from some of them extensions and renewals and new credit in at least one proven case. Neither is the unexplained alteration of the mortgage, aside from its technical effect as an alteration, consistent with a bona fide purpose to secure a lien for an honest debt. These facts and others, not so important, but yet of some weight which appear in the transcript, convince us that the lien claimed was not a bona fide lien of more than four months' existence at date of bankruptcy."

The Circuit Court of Appeals thereupon came to the conclusion that the executors of Thomas Merriam should account to the trustee in bankruptcy for all the proceeds of the sale of the bankrupt's interest in this coal land which were applied to the debts and claims of Thomas Merriam and to the debts and claims upon which Thomas Merriam was liable, but not for the proceeds of this sale which actually went to the benefit of the estate.

The Supreme Court held that the question of whether the preferred creditor had been guilty or not guilty of actual fraud was of no moment in this case, saying: "The alternative ruling that the trust deed was invalid for want of good faith and because it was agreed to be withheld from record to mislead

and defraud creditors may be disregarded. Therefore we need not consider whether the bill should have been amended to permit an attack on the deed as fraudulent."

After thus deciding that the question of fraud or no fraud was immaterial, it modified the judgment which had been entered by the Circuit Court of Appeals, stating: "All that has been said would naturally lead to an affirmance of the decree. Nevertheless we are of the opinion that it ought to be modified for a reason not dwelt upon in argument. Now that this litigation has come to an end and the defendant has been compelled to surrender the preference which he received, he is entitled to prove his claim and to receive a dividend on it upon an equality with other creditors. * * * The defendant may be permitted, if he shall be so advised, to prove his claim against the estate of the bankrupt, and the bankrupt court then may settle the amount of the dividend coming to him, and the final decree may direct him to pay over the full amount of his preference, with interest, less the amount of his dividend. Solely for the purpose of accomplishing this result, the final decree in the case is reversed and the case remanded to the district court to take proceedings in conformity with this opinion."

It will thus be seen that the Supreme Court has held in this opinion that if a creditor has a valid indebtedness against the bankrupt and is not ultimately to retain an illegal preference, he may recover his dividend and it is entirely immaterial that in transactions connected with this very indebtedness he has been guilty of fradulent conduct.

Another theory upon which the decision of the district judge might be attempted to be upheld is, as stated in the judge's opinion:

> "By their acts, both as creditors and for the corporation, said company's property was transferred in such a way, as found by the referee, that neither they nor the corporation could recover it. The other creditors, alone, could compel its return to the corporation. They did so. To now hold that the claimants, who were parties to such transfer, may resort to the property they helped put out of the reach of the corporation and themselves, the same as the other creditors, would neither tend to encourage innocent creditors to diligence, nor discourage those dishonestly inclined from scheming for an unfair advantage." (*Trans.* p. 46.)

The trouble with this theory is that it is borne out neither by the facts nor by the law. This is not a contest between the Orchard Company or Wells as a creditor and the Summit Investment Company standing squarely upon the conveyance to it and in the situation which existed immediately after the

execution of the deed to it. At the time of the institution of bankrupcty proceedings there had been executed the agreement of December 30, 1912 (*trans.* p. 93 et seq), by which every one connected with the Summit Investment Company had recognized the assets of this company as in fact the assets of the Wenatchee Heights Orchard Company, and which was a legally enforcible contract against the Summit Investment Company in favor of the Orchard Company, and all persons claiming rights thereunder, including this claimant.

The conclusion of the district judge when he states that this claimant helped to put this property "out of the reach of the corporation and themselves," is not borne out by the facts. The property, as the outcome shows, was, upon demand, within the reach of the corporation and was voluntarily returned immediately upon demand being made. Although the purpose of this transfer, as stated by Mr. Wells, was to discourage litigation in the way of damage suits, it does not appear in the record that any one was in fact either hindered, delayed or defrauded, and if anyone had been so hindered, delayed or defrauded, it is only reasonable to believe that it would have been shown upon the hearing upon this claim.

Altogether four different hearings were had before Judge Hoyt in this matter upon which the Summit Investment Company deal was taken up, to-wit: February 11, 1913 (*trans,* p. 86), June 11, 1913 (*trans.* p. 70), June 23-24, 1913 (*trans.* p. 75), and September 3, 1913 (*trans.* p. 70), and Judge Hoyt, the referee who conducted these hearings, in his order refused to find this claimant guilty of any intentional fraud in the entire proceedings.

The trustee obtained these assets by deed which contained no reservation whatever. The Summit Investment Company never asserted any claim against this property adverse to the claims of the Orchard Company but, from the time when it received conveyance, has turned over all the rents and profits to the Orchard Company as the assets of the Orchard Company and, as appears from its actions, has at all times been ready to recognize the rights of the Orchard Company when called upon. The trustee received these assets and now holds them as the assets of the bankrupt, and to permit certain creditors to obtain a preference in these proceedings would be violative of the first principle of the Bankruptcy Act, which is, in the closing language of Mr. Justice Brown in *First National Bank v. Staake,*

202 U. S. 141, "designed to secure equality among all creditors."

The last word upon this question of the relative situation between different classes of creditors in the proceeds of a conveyance which has been abandoned or set aside, is contained in *L. A. Becker Co. v. Gill,* 206 Fed. 36, wherein an attempt was made to postpone the claim (as a general creditor) of a conditional sale vendee who had abandoned any claim under his conditional sale contract. The Circuit Court of Appeals of the eighth circuit, however, speaking through Hook, Judge, said:

"The trial court, having held the unrecorded contract of conditional sale void as to creditors who became such after it was executed, then ruled that, while appellant might prove its claim as a general creditor, it could not participate equally with them because they, the subsequent creditors, had an equitable lien on the property in question superior to the prior general creditors, and were first entitled to the proceeds. The court followed *In re Wade* (*D. C.*) 185 Fed. 664, and *Simmons v. Greer*, 98 C. C. A. 408, 174 Fed. 654. We think the right of the subsequent creditors is merely a defensive one against the holder of the contract of conditional sale who has failed to comply with the registry statute, and that it is not a lien giving them a preference upon distribution in bankruptcy. It prevents the successful assertion against them of an unrecorded instrument, but does not in addition confer an affirmative right against others. In such cases the defense against the unrecorded instrument is generally due directly or primarily to the provisions of the statute. In a broad

sense the statute is founded upon considerations of justice and equity which are recognized and frequently referred to by the courts in construing and applying it, but it was not intended by such references to give the parties so protected a substantive lien superior to others. *If the holder of the unrecorded instrument made no claim on it, but was content to be a general creditor, it would hardly be contended that subsequent creditors upon discovering its existence could bring it up themselves as ground for a lien or preference over creditors otherwise of the same class.* It does not seem admissible that the existence of such a lien should depend upon the assertion of the unrecorded instrument by the holder and his failure. Equity has a large place in the administration of the bankruptcy law, but so far as may be without disturbing positive rights the dominant note is that "equality is equity." An assignment for the benefit of creditors which is vacated by proceedings in bankruptcy may yet be used to defeat, for the benefit of the estate, an intervening execution levy. *Reed v. McIntyre,* 98 U. S. 507, 25 L. Ed. 171. Section 67f of the present Act (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450]) provides that liens obtained by legal proceedings within four months prior to the filing of the petition in bankruptcy shall be void unless the court preserves them for the benefit of the estate. In *First National Bank v. Staake,* 202 U. S. 141, 26 Sup. Ct. 580, 50 L. Ed. 967, liens of attaching creditors void under the section cited were nevertheless preserved for the trustee against a prior unrecorded conveyance by the bankrupt which solely regarded was valid between the parties and as to the trustees. And the property so saved was for the general estate, not for a special class of creditors. If in the case at bar liens had been obtained by the subsequent creditors by judicial proceedings within the four

months, they would, in the discretion of the court, have been set aside or retained for the benefit of the general estate in bankruptcy. Yet, it is urged that by an equitable lien, purely by construction, the subsequent creditors regardless of proximity in time to the bankruptcy proceedings secure a preference they might not have been able to get by industrious resort to the courts. In equity it would appear that when appellant's contract is out of the way its right of participation is equal to that of subsequent creditors. Its property enriched the estate of the bankrupt as well as theirs, and to deny it a ratable participation would be an undue punishment for an ineffectual attempt to secure or protect itself."

In conclusion, we respectfully submit that an analysis of the actions of this claimant shows that he never had any intention of actually depriving any creditor of his just rights in this estate. It is true a conveyance was made to the Summit Investment Company, but all of the revenue arising from the property was turned back to the bankrupt company and used for the company purposes. The suit which was begun in the superior court was begun without any notice whatever having been given to the claimant or demand for any restoration, and six days after this suit was begun we find this claimant entering into a written agreement with all other parties concerned acknowledging that the assets of the Summit Investment Company are in fact the assets of the Wenatchee Heights Orchard Company and

were to be used in carrying on the business of the Orchard Company, and later, as soon as a trustee in bankruptcy is appointed who could hold the title to the property, the property is voluntarily surrendered to the trustee. There is not the slightest evidence of any attempt to hinder, delay or defraud other than the mere fact of the entry in the minutes of the Orchard Company (which does not appear to have ever been shown to anyone) and the execution and recording of the deed (which does not appear ever to have deceived or harmed anyone). All the other actions of this claimant point to a bona fide intention and desire faithfully to carry out the corporate objects and purposes of the company at considerable sacrifice of his own personal interests. Among some of these actions are his loaning to the company various sums aggregating over $12,000, including over $3,000 loaned to the company subsequent to the Summit Investment Company deal, $2,000 of which he borrowed from the bank upon his own note to lend to the company. He personally guaranteed the performance of many of the contracts of the bankrupt company. When a judgment was obtained against the company he and McPherson signed the supersedeas bond as sureties to enable the company to appeal to the Supreme Court. Right up to the insti-

tution of the receivership proceedings this claimant was ever ready to help out the bankrupt corporation by personal advances of money and by the loan of his credit. We respectfully submit that, even if fraudulent conduct could have the effect of postponing a just claim in bankruptcy, such fraudulent conduct does not appear in this case and that the decision of the referee who saw and heard this claimant testify before him on two different occasions (June 23, 1913, and September 3, 1913) and heard his co-officer McPherson testify before him on two other different occasions (June 11, 1913, and February 11, 1913), and failed to find them guilty of any actual fraud, should be upheld, and that the order of the District Court modifying the order of the referee should be reversed, with instructions to affirm the order of the referee.

Respectfully submitted,
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